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JUVENILE COURT LAW IN THE STATE OF UTAH.

We have an opinion upon the constitutionality of the juvenile court law handed down by the Supreme Court of Utah. The most striking part of the opinion is the total lack of knowledge displayed therein of the nature and source of the juvenile court law. The court seems to have recognized no "*datum posts*," and to have gotten lost in a wilderness and after many days and devious ways found a way out. The opinion leaves out of consideration entirely the grounds upon which the constitutionality of the law is rested, as shown by the opinions of other courts. It seems as though, after all that has been said by other courts, a really good opinion could now be written by any supreme court upon this subject. One of the most comprehensive opinions we have met with is that of Judge McEwen, sitting as a chancellor in the Circuit Court of Cook County, Illinois, which may be found in 61 Cent. L. J. 289. Article 8, sec. 7, Rev. St. of Utah, 1898, provides: The district court shall have original jurisdiction in matters civil and criminal not excepted in this constitution and not prohibited by law, etc. Sec. 9 provides: In equity cases the appeal may be upon both questions of law and fact. Sec. 7, art. 1, provides that no person shall be deprived of life, liberty or property without due process of law.

The above shows that the constitution of Utah recognizes equity as fully as it does common law powers in its due process of law. It follows then when the legislature provided for juvenile courts in Utah, it was providing for a court which would be governed by the rules of equity. There can be no escape from this proposition, because it is so established everywhere. On page 662, Vol. 2, Story's Equity Jurisprudence, 13th Ed., he says: "We shall next proceed to the consideration of another portion of the exclusive jurisdiction of courts of equity, partly arising from the peculiar relation and personal character of the parties who are proper objects of it, and partly arising from the mixture of public and private trusts of a large and interesting nature. * * * Assuming that the general care and superintendence of infants did originally vest in the crown, when they have no other guardian, the question by whom and in what manner the prerogative should be exercised should not seem open to much controversy. Partaking as it does more of the nature of a judicial administration of rights and duties in *foro conscientiæ* than of strict, exclusive authority, it would naturally follow, *ea ratione*, that it should be exercised in a court of chancery as a branch of the general jurisdiction originally confided to it." On page 665 *Id.*, sec. 1341, the author also says that the jurisdiction of a court of equity extends to the care of the person of the infant so far as it may be necessary for his protection and education and to the care of the property of the infant for its due management and preservation and proper application for his maintenance. It is upon the former ground principally, that is to say, for the due protection and education of the infant, that the court interferes with the ordinary rights of parents as guardians by nature or nurture, in regard to the custody and care of the children. For, although in general parents are intrusted with the custody of the persons and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of and will be brought up with due education in literature and morals and religion and that they will be treated with kindness and affection. But whenever this presumption is removed, whenever (for example) it is found that a father is found guilty of gross ill treatment or cruelty towards his infant children or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery, * * * or that his domestic associations are such as to tend to the corruption and contamination of his children, in short, if the parents of the child or children are such as to render them unfit persons, the author says: "In every such case the court of chancery will interfere and deprive them of the custody of their children and appoint a suitable person as a guardian to take care of them and superintend their education." See note to case, *Ex rel* Christiensen, 62 Cent. L. J. 226, where the cases are gathered.

So it is shown that the first thing to

do is to find out whether the parents of the child or guardians are unfit persons to have the care and custody of the child or children about which the court may be concerned. Having concluded this the question as to how the court may deal with the parents who may attempt to interfere with the children afterwards, is very simple. It is not necessary to enter into a discussion of the inherent power of courts to punish for contempt. Courts of equity may act without the intervention of a jury. The judge of a juvenile court by its very nature is clothed with the powers of a chancellor. All this is fundamental law. Herein comes the importance of construction which seems to have been totally lacking in the opinion in question. Upon construction depends whether our laws are to be a curse or a blessing. "Courts can not build in opposition to fundamental law. Whatever the language employed, it must admit of such incidents as presumed knowledge of the law, that for greater laws the lesser must yield, because of the public welfare, necessity, good morals, reason and convenience." Hughes' Procedure, Vol. 2, p. 829. There is every reason, both from public policy and convenience, that in respect to delinquent children and the parents who are accountable for their delinquencies, such children should be under the jurisdiction a court of chancery, and should it become necessary in the exercise of this jurisdiction to punish the parents by depriving them of their liberty, the public good is the first concern of the government, and there is no infraction of the constitution in so depriving them. In the very nature of the jurisdiction, the parents of the delinquent children are brought into the jurisdiction of a court with full chancery powers, and if the public good under certain circumstances seems to require that the parents should be deprived of their liberty, such a court may exercise that power without the intervention of a jury. See 61 Cent. L. J. 102, "The Juvenile Court in Utah as a Branch of Equity Constitutionality." This seems so plain a proposition of equity that it seems amazing that the courts have failed to grasp it. Whatever laws the legislature made to aid this jurisdiction changed neither the nature of the laws nor the jurisdiction. The whole process was one of equity, and in the interpretation of the statute the broad construction of the rules of equity should have been applied.

As to the attack by the court upon Judge Brown, there appears to have been no warrant. Judge Brown has almost a national reputation as a lover of children and has done much for the good of boys in many parts of the country. While there is no doubt that a knowledge of the law aids a judge of a juvenile court, yet a supreme knowledge of the law is not by any means sufficient to make a good judge. Some judges learned in the law are absolute failures in juvenile courts and as between a knowledge of boys and their needs and a knowledge of the law, the former is infinitely better if, with the latter there is not a full quota of the former. Juvenile court judges are born such. The knowledge of the law necessary in such a judge may soon be acquired. Besides that there is nothing to prevent his calling in a district judge, either to confer with or sit with him on the few occasions when he might be needed, and it is certain that his acts may be reviewed by a higher court.

In speaking of this chancery jurisdiction, in the celebrated case of Wellesly v. Duke of Beaufort, 2 Russ. 20, Lord Eldon said: "I do apprehend that notwithstanding all the doubts that may exist as to the origin of this jurisdiction, it will be found absolutely necessary that such a jurisdiction should exist, subject to correction by appeal, and subject to the most scrupulous and conscientious conviction of the judge that he is to look most strictly into the merits of every case of this kind and with the utmost anxiety to be right." It might not be amiss to enact laws which would enable the judge of the juvenile court to call in the district judge to his assistance when he deemed it wise. This would be a good law whether or not the juvenile court judge happened to be learned in the law.

NOTES OF IMPORTANT DECISIONS.

LIABILITY FOR OBSTRUCTIONS PLACED ON SIDEWALKS.—In the recent case of Ryan v. Foster (Ia.), 109 N. W. Rep. 1108, there is presented an interesting case. At first blush it might seem that the right of recovery was doubtful but the case is determined upon the right principle, for, while the plaintiff may have been chargeable with contributory negligence, the proximate cause was the placing the billboard in question on the

sidewalk, when, by a little forethought, the defendant could have avoided the possibility of the accident, for, the defendant could have as well taken it down without placing it so that it would have obstructed the walk. This case fully represents the obligations of the parties in respect to obstructions placed upon sidewalks, even though they are at the time removing the obstruction. The court said: "The plaintiff when passing along the sidewalk on the north side of Center street, between Eighth and Ninth streets, in the city of Des Moines on February 5, 1902, shortly after 10 o'clock in the forenoon, caught her foot on a billboard lying on the walk, fell, and was seriously injured by the nails protruding from the board. But two errors are assigned. These relate to the sufficiency of the evidence to sustain the verdict, and the refusal of an instruction requested. It appears that billboards of defendant and an amusement company had been erected from a point four feet north of Center street on the east line of the alley diagonally to the northeast. These were in sections 16 feet long and 10 feet high, consisting of common inch boards a foot wide and 16 feet long nailed to four inch by four inch posts set 8 feet apart. In the morning in question two employees of the defendant were sent to remove these billboards, and, in so doing, had cut off the two southwest posts, loosened the boards from the third post, and allowed the section to fall forward partly on the sidewalk. One of the employees was called as a witness, and testified that as soon as the section fell he and his companion 'started taking it to pieces, started knocking the boards off, and carrying the four by fours back' and that they did so at 'the northeast end of this section;' that they were tearing the boards apart when the plaintiff came along; that the boards extended diagonally on the sidewalk, which was five feet wide within a foot or two from the outer edge, that the boards had been on the walk only 5 or 10 minutes prior to the accident. On the other hand, the plaintiff testified that boards extended across the walk over on the parking, and that she did not notice a four by four post where she fell. It will be observed that the employee's account is inconsistent, for that, although he claimed to have loosened the boards from the upper posts when standing, he testified that he and his assistant began knocking the ends of the boards loose at the same place after the section had fallen. Had there been a post at the southeast, plaintiff would have been likely to have noticed it. Moreover the fact of nails protruding is a circumstance indicating that the post had been removed. The employee may have been confused in his directions, at least the jury might have so found, and that he commenced at the lower end and may have been working at the middle scantling when the accident happened, for the witnesses agree that the boards were fastened together somewhere. Assuming, then, as the jury might have found that the billboards were lying flat on the walk, with remnants of posters beneath, and the top somewhat weather colored, and no scantling projecting, can it be said, as a matter of law, that plaintiff was negligent in not seeing and avoiding the obstruction? The day was cold and cloudy. Snow was falling, and the wind blowing in her face. She had traveled over the walk frequently, and had noticed its condition the night previous. In these circumstances we are of opinion that the issue as to whether she contributed to her injury by her own negligence was for the jury to determine. As we have had occasion to decide many times, a traveler is not bound to make of himself an inspector of sidewalks every time he passes over them nor is he required at his peril to discover every defect therein, or obstruction, although these may be open and visible. He has the right to assume, in the absence of knowledge to the contrary, that the sidewalks are in a reasonably safe condition for travel, and in passing over them, is required to do no more than make such use of his senses, and to exercise such caution as persons of prudence ordinarily use and display under like circumstances. Barnes v. Town of Marcus, 96 Iowa, 675, 65 N. W. Rep. 984; Rusch v. City of Dubuque, 116 Iowa, 402, 90 N. W. Rep. 80; Machacek v. Hall (Iowa), 105 N. W. Rep. 690. Bender v. Town of Minden, 124 Iowa, 686, 100 N. W. Rep. 352, is readily distinguishable as there the plaintiff had stood within 18 inches of the open ditch 15 or 20 minutes before he stepped in and must have observed it. Here the boards which could not have differed greatly in color from the walk were but an inch above it, and the weather was such as naturally to divert attention somewhat from noticing obstructions, even though the traveler were keeping a lookout in the direction of the course being pursued. What has been said also indicates that the instruction was rightly refused.

Appellant next contends that though his employees obstructed the street, they had the right to do so in removing the billboards. Counsel rely on authorities to the effect that an abutting owner may temporarily encroach on the street by the deposit therein of building materials, if engaged in building, or in conveying goods to his store and in other ways, without creating a nuisance. The rule is based on necessity, not absolute, but reasonable, and when resorted to the obstruction must be at as slight inconvenience to the traveling public as possible, and continue for a reasonable time only. The decisions on this subject are too numerous for citation, but see Callanan v. Gilman (N. Y.), 14 N. E. Rep. 407, 1 Am. St. Rep. 834, and extended note. The evidence does not bring the case at bar within the rule. There was no necessity for allowing the section of billboards to fall over the sidewalk. It might quite as well have been dropped the other way even though this were less convenient in taking the section apart. Moreover the boards could have been removed, while the posts were standing. Even if allowed to fall across the side-

walk the employees were without excuse in leaving it there instead of immediately drawing it back on the lot. They had no right to prosecute such work on the street, and, in doing so, were unlawfully obstructing it. They might carry the lumber from the lot across the walk to load it, and temporarily obstructing the street for that purpose would be permissible. But the obstruction here was for no such purpose. The billboards were unnecessarily dropped on the sidewalk and unnecessarily allowed to remain there with nails protruding while the work was done." See Cent. Dig., Municipal Corporations, Vol. 36, sec. 1688.

REMOVAL OF CAUSES WHERE THERE HAS BEEN A FRAUDULENT JOINDER OF DEFENDANTS —SUFFICIENCY OF PLEADING AND PROOF.—In a recent opinion of the United States Circuit Court of Appeals, Seventh Circuit, in the case of Offner v. Chicago & E. R. Co., 148 Fed. Rep. 201, a question was raised with regard to pleading and practice which it is well for the young practitioner to learn and for the older members of the bar to keep in mind. The "theory of the case," will not do in the United States Courts. The court says: "It has often been decided that an action brought in a state court against two jointly for a tort cannot be removed by either of them into the Circuit Court of the United States upon the ground of a separable controversy between the plaintiff and himself, although the defendants have pleaded severally, and the plaintiff might have brought the action against either alone. It is equally well settled that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavits of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court. Louisville & Nashville R. Co. v. Wangelin, 132 U. S. 599, 10 Sup. Ct. Rep. 203, 33 L. Ed. 473; Alabama Southern Ry. Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. Rep. 161, 50 L. Ed. 441, and cases therein reviewed.

The averment of the petition that the Western Indiana 'was not a party to the alleged negligence' is of no avail in the face of the charge in the declaration that that company, with knowledge of Offner's peril, and without giving him any warning, ran its engine upon him, because that averment comes under the general rule, and not under the exception.

Respecting the averment of the petition that the Western Indiana 'was fraudulently joined as party defendant solely for the purpose of defeating your petitioner's right to remove this cause,' the exception stated in the authorities requires both proper pleading and due proof of fraudulent joinder.

In a case involving the sufficiency of a petition for removal, which alleged that the action arose under the laws of the United States, the Supreme Court laid down rules of pleading which apply to every ground of removal: 'For the purpose of the transfer of a cause, the petition for removal, which the statute requires, performs the office of pleading. * * * It should therefore set forth the essential facts, not otherwise appearing in the case, which the statute has made conditions precedent to the change of jurisdiction. If it fails in this, it is defective in substance, and must be treated accordingly. * * * The office of pleading is to state facts, not conclusions of law. It is the duty of the court to declare the conclusions, and of the parties to state the premises.' Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. Ed. 656.

And so, the cause was ordered to be remanded, because neither the complaint nor the petition for removal stated facts from which the conclusion followed that the action arose under the laws of the United States. The rules, though stated in a case involving another ground of removal, in terms are broad enough to apply to a petition for removal on the ground that the controversy between the plaintiff and the petitioner is separable on account of the fraudulent joinder of a local defendant; and they should be so applied, because they rightly accord with the general rule that fraud cannot be pleaded simply by crying fraud. In this case the verified petition (and good practice requires that petitions for removal be verified, Kansas City R. Co. v. Daughtry, 138 U. S. 298, 11 Sup. Ct. Rep. 306, 34 L. Ed. 963) was the only evidence offered by the petitioner, upon whom lay the burden. If the statement that the Western Indiana 'was fraudulently joined as a party defendant' is bad as pleading, it is worse as proof. On a question of fraud the opinion of a witness is not admissible. Certainly, the erroneous admission, without the statement of a single fact to warrant the entertainment of such an opinion, cannot make out a *prima facie* case.

In Plymouth Mining Co. v. Amador Canal Co., 118 U. S. 264, 6 Sup. Ct. Rep. 1034, 30 L. Ed. 232, a joint tort was counted on, and the petition for removal on the ground of a separable controversy charged that the local defendants were fraudulently joined for the purpose of preventing a removal. The cause was remanded; the court holding that the charge in the petition, presumably verified in accordance with good practice, was unavailing in the absence of proof of facts which would establish fraud as a conclusion. Where motions to remand have been overruled in the circuit courts, the removing petitioners have supplied the premises of facts, from which the courts have declared the conclusions. Arrowsmith v. Nashville & D. R. Co. (C. C.), 57 Fed. Rep. 165; Shepherd v, Bradstreet Co. (C. C.), 65 Fed. Rep. 142; Diday v. New York, P. & O. R. Co. (C. C.), 107 Fed. Rep. 565. The petitioner assumes the burden of establishing 'that the

allegations of joint liability were unfounded in fact, were not made in good faith with the expectation of proving them at the trial, and were made solely for the purpose of evading the jurisdiction of the federal court.' Hukill v. Maysville & B. S. R. Co. (C. C.), 72 Fed. Rep. 745."

SOME OBSERVATIONS ON THE DURATION OF OIL AND NATURAL GAS LEASES.

In determining the duration of oil and gas leases, it becomes necessary to take into consideration the peculiar characteristics and elements of the substances, which the leases are intended to convey. It is now well settled that gas and oil are minerals,[1] but the fact that these substances are minerals does not carry with it as a conclusion, that the rules of law which apply to minerals in general, apply in all cases to oil and gas. The attempt of parties, who draw up oil and gas leases, to follow old forms and established principles, and to adapt them to the new conditions which must necessarily arise under leases of this character, has flooded the courts of the oil and gas producing states with a multitude of cases seeking interpretation of leases concerning these minerals.

An Indiana court thus comments on the reason for the vast amount of cases of this character:[2] "Since the comparatively recent discovery and utilization of petroleum and natural gas in this county and in this state, the courts have had to deal with many controversies involving rights and obligations under contracts in which the interested parties and their counsel have sought to adopt old forms and established principles to the new subject matter; and there is perhaps little occasion for wonder at the diversity of contracts which have come before the courts. Many of these contracts have assumed the form, in great part, of leases of land, a corporeal hereditament, susceptible of livery of seisin, upon which may be re-entry upon forfeiture of the estate therein, and which may be dealt with in litigation upon long used and familiar principles. Sometimes the written instruments in question have taken the form of grants of incorporeal hereditaments not susceptible of livery of seisin, and sometimes provisions heretofore recognized as peculiarly belonging to leases have been intermingled with provisions heretofore generally found only in instruments usually denominated deeds of conveyance."

Oil and gas leases must be construed with reference to the known characteristics of the business; the nature of oil and gas, the pressure of the superincumbent rocks, and the vagrant habit of both fluids under the influence of this pressure, must be taken into consideration.[3] In ordinary leases, such as agricultural and kindred leases, the time of the duration is usually specified and the question as to the extent of the duration is thus often eliminated, but in oil and gas leases we find that a fixed period of duration is not the rule, but rather the exception to the rule. There is scarcely a lease in existence that does not contain conditional clauses which determine its duration. A common stipulation found in most oil and gas leases is one which limits the duration of the lease to a stated period of time unless the property leased be properly developed, stipulations of this character have been universally upheld by the courts. And not only have the courts held that condition concerning development of the leased property must be fully complied with, but they have gone further, and have held that when the lease is granted it contains an implied condition that the premises should be speedily developed.[4] A Pennsylvania court,[5] discussing this subject, said: "Forfeiture for non-development or delay is essential to private and public interests in relation to the use and alienation of property. In such cases as this equity follows the law. In general equity abhors a forfeiture, but not when it works equity and protects a land owner from the laches of a lessee whose lease is of no value till developed."

[1] Stoughton's Appeal, 88 Pa. St. 201; Ohio Oil Co. v. Indiana, 177 U. S. 190; Gas Co. v. DeWitt, 130 Pa. St. 235; Kelley v. Oil Co., 49 N. E. Rep. 399; Wilson v. Youst, 43 W. Va. 826; 60 Cent. L. J. 465; Managhan v. Mount (Ind. App.), 74 N. E. Rep. 579; Ontario Natural Gas Co. v. Gasfield, 18 Ont. App. 626.

[2] Managhan v. Mount (Ind. App.), 74 N. E. Rep. 579.

[3] McKnight v. Gas Co., 146 Pa. St. 185; 23 Atl. Rep. 164, 28 Pa. St. 790; Gadbury v. Gas Co., 162 Ind. 9; 67 N. E. Rep. 259.

[4] Venture Oil Co. v. Fretts, 152 Pa. St. 451, 25 Atl. Rep. 732; Gadbury v. Gas Co., 162 Ind. 9; Gas Co. v. Littler, 162 Ind. 320; Munroe v. Armstrong, 96 Pa. St. 307.

[5] Munroe v. Armstrong, 96 Pa. St. 307.

In many of the states where oil and gas have been newly found or discovered, many acres of the territory in the vicinity of the test wells, and over the supposed oil or gas bearing stratum, have been leased by corporations and individuals who hold the same for speculative purposes purely. To remedy these conditions the courts at an early date in the history of the oil and gas industry, held that a lessee could not omit to develop the property and hold the grant for speculative purposes purely.[6]

In an Indiana case[7] the duration period of the lease read as follows: "It is agreed by the parties, that whenever, in the judgment of the second party, his heirs or assigns, oil or gas, or either, can not be found on the premises, or, having been found, have ceased to exist in paying quantities, and said party of the second part shall reconvey to the first party, their heirs or assigns, all the oil and gas in and under said premises, then all payments of every kind to be made to the first party by the term hereof shall from and after said date cease and determine."

In interpreting this clause Judge Hadley speaking for the court said: "It is as obvious as if expressed that the real intention of the parties was that the gas company or its assigns should, with diligence, and within a reasonable time, enter upon the premises and drill a well, and thereby test the existence or nonexistence and continuance of the fluids in paying quantity. We judicially know, as a matter of common knowledge, that gas or oil does not exist in paying quantities under all the lands within the recognized district, and that there is no other generally acknowleged way than by putting down a well to determine whether or not it does exist. The company's undertaking to pay the landowner until, in the judgment of the company, 'oil or gas can not be found on the premises, or, having been found, has ceased to exist,' clearly implies an engagement to explore and develop the premises. The stipulation does not contemplate an arbitrary judgment, but an honest one; a judgment that is justified by the results of a *bona fide* investigation; such as could only be arrived at by sending down the drill to where the oil or gas is or should be."

The best rule seems to be that an obligation to explore, though often only implied in an oil or gas lease, should be treated as a condition, which if not performed within a reasonable time, would entitle the lessor to a forfeiture of the lease.[8] While it is firmly settled that a lessor may declare a forfeiture for the non-development of a lease, it is equally well settled that the lessor may waive his right of forfeiture by accepting payment of rent in lieu thereof,[9] and he would be estopped from declaring a forfeiture if he had allowed the lessee to expend money on the lease and do work thereon after a delay of sufficient length to entitle the lessor to a forfeiture had passed.

In the case of Riddle v. Mellon[10] the court in the syllabus fairly states the question raised and decided, where it said: "An oil and gas lease was made for the term of one year and as long as oil and gas are found in paying quantities. The lessee drilled a well during the year but failed to develop oil or gas in paying quantities. The lessor brought trespass against the lessee for entering to prosecute further drilling several months after the year expired. Held, under the testimony as presented at the trial, that the jury was properly instructed that, if the lessor after the expiration of the year and before the alleged trespass, encouraged and allowed the expenditure of money and labor in operations on the lease, on the basis of its continuation he would be estopped from asserting that it was then at an end."

[6] Kleppner v. Lemon, 176 Pa. St. 502, 35 Atl. Rep. 109; Bluestone Coal Co. v. Bell, 38 W. Va. 297, 18 S. E. Rep. 493; Federal Oil Co. v. Western Oil Co., 112 Fed. Rep. 373; Consumer's Gas Trust Co. v. Littler, 162 Ind. 320; Oil Co. v. Marbury, 91 U. S. 587.

[7] Gas Co. v. Littler, 162 Ind. 320.

[8] Gas Co. v. Littler, 162 Ind. 320, and cases there cited; Federal Oil Co. v. Western Oil Co., 112 Fed. Rep. 373. Where failure of the lessee for two years to develop the premises, after drilling a well, finding gas, and then closing it, was held *prima facie* to authorize the grantor, who was to be paid $100 per annum for each well while gas was being used off the premises, without demand, to treat the grant as abandoned. Gadbury v. Ohio, etc., Gas Co., 162 Ind. 9. The earlier cases seem to hold that there could be no forfeiture for violation of an implied covenant, unless the lease expressly so provided. Eaton v. Gas Co., 122 N. Y. 416, 25 N. E. Rep. 981; Harris v. Ohio Oil Co., 57 Ohio St. 118, 48 N. E. Rep. 502. The remedy of the lessor was considered to be an action in damages.

[9] Ray v. Western, etc., Gas Co., 138 Pa. St. 576, 20 Atl. Rep. 1065, 12 L. R. A. 290; Consumers' Gas Trust Co. v. Worth, 163 Ind. 141.

[10] 147 Pa. St. 30.

In the able treatise of Judge Donahue, on the subject of Petroleum and Gas, we find the following statement upon this question:[11] "A lessor will be estopped from declaring a forfeiture, when a well was not commenced within the time specified in the lease, or the money paid for failure to commence the well, and the well was not completed until after the time specified, and no money paid for the non-completion of the well until after the expiration of the time the money was to be paid, and then the lessee paid only the amount due for not commencing in time, and sometime thereafter, the amount was tendered for the non-completion of the well in time, but the lessor refused to accept the money. Also where the lessor, after the expiration of the time, permitted the lessee to select a place on the lands leased, after the time for operations had expired, and sold fuel to the lessee, which was used in the prosecution of the work on the premises, and built a dam for the lessee to furnish water needed in the operations."

In numerous oil and gas leases we find that they are to continue so long as oil or gas can be produced in "paying quantities," or they are to continue for a certain number of years and so long thereafter as these minerals can be produced in paying quantities. The interpretation of these clauses by the courts has not been uniform. Thus in a New York case[12] a lease for a term of "twelve years from this date, or so long as oil is found in paying quantities" was held to be a lease for the length of time during which oil is found in paying quantities, the clause "paying quantities" fixing the duration of the term, while the majority of the holdings upon this subject have been that the period of time designated, is the period in which the lessee must develop the premises, and should the premises be fully developed within a shorter period and it clearly appears that the minerals could not be mined at a profit, then the lease will terminate. This holding seems somewhat unreasonable where the period given is of long duration, but in the absence of fraud the courts will not relieve a lessor where the lease was executed fairly and all the terms were understood by the parties, at the time of the execution thereof.

In the case of Western Pa. Gas Co. v. George,[13] the lease was for "two years and so long thereafter as oil or mineral substances could be produced in paying quantities." In construing this lease the court said: "The continuance of the lease beyond the definite term was contingent upon the finding of oil or gas in paying quantities, and on the payment to the lessor in such case of his share of the oil produced, or the stipulated sum for each well from which gas was obtained and sold. The primary and essential condition to any extension of the lease after the lapse of two years from its date was the finding of oil or gas in paying quantities within that time, and the secondary condition was that the rent reserved for the oil or gas found should be paid in conformity with the covenants in relation thereto."

In an Indiana case, the lessor leased the land to the lessee "for the term of twelve years, and so long thereafter as petroleum or mineral substances can be produced in paying quantities;" there were also provisions for a payment of a certain sum of money per year in case of delay in commencing operation. The court said: "It is not necessary to inquire whether the lessor was bound to let the lessee hold the land for twelve years without attempting to develop it, because it was held by the lessee for twelve years, and the payments for delay were accepted by the lessor. But, giving effect to all the provisions contained in the lease, we think a reasonable and equitable interpretation is that the lessee, by making the annual payments, could not hold the premises longer than twelve years without drilling or commencing to drill a well, and that the lessee could hold the premises as long beyond the twelve years as oil and gas could be produced in paying quantities, upon payment of the royalties and well rentals."

When a lease required the lessee, if oil be found in paying quantities, to pay the lessor six hundred dollars within thirty days, the court held that such a contract or lease was enforceable. The court said: "The obvious intention was that, if, for the period of thirty days after its completion, the well continued

[11] Donahue on Petroleum & Gas, p. 262, sec. 10. See also Thornton on the Law Relating to Oil and Gas, p. 191.

[12] Eaton v. Gas Co., 122 N. Y. 416.

[13] 161 Pa. St. 47, 28 Atl. Rep. 1004.

to produce oil in such quantities as to make it profitable to operate it during that period, the six hundred dollars should be demandable."[14] In the same opinion we find an able and interesting discussion as to the meaning of the phrase "paying quantities." The court in part says: "There is a great difference between a paying well, *i. e.*, a well producing oil in paying quantities, and one that pays for itself. A mine for years may produce ore in paying quantities and be very profitable during that time, and yet, through a later depreciation in the value of the mineral extracted from the ore, or from accident or failure to yield enough ore, it may never repay its first cost." Where a lease provided that it should run for a certain period of time and as much longer as oil should be found in paying quantities, and where one well had been drilled, which produced some oil and then failed, it was held that as the whole premises were leased for the period designated, the lessee had a right to make a proper and reasonable search for the fluids, and was not confined to the showing made by the first or test well.[15] While oil leases and gas leases are usually treated together and while the same principles of law may be applied in their interpretation, yet the phrase "paying quantities" as applied to a natural gas well requires different conditions to render the lessee liable to a forfeiture, than it does when applied to an oil well. This difference is brought about by the difference in the methods of production of the two fluids, one requiring a pump of little expense while the gas well when pumped requires a complicated and expensive mechanical device. This difference in the method of production is recognized and taken into consideration by the courts in their interpretation of these various leases. In the case of McKnight v. Manufacturers, etc., Co.,[16] this question is ably discussed by the Supreme Court of Pennsylvania. The court there said: "A lease of land for oil purposes imposes a somewhat different obligation upon the lessee. The oil is of such a nature that, if not removed through wells upon the surface of the leasehold, it may be wholly lost to the owner of the land by reason of operations on lands adjoining. The duty [to develop the land, that is, to test thoroughly the existence] of oil in the rocks that should bear it, and if oil be found, to sink so many wells as may be reasonably necessary in view of surrounding operations to secure so much of the oil underlying the land as may be obtained with profit, grows out of the nature of oil, and the methods by which the oil is reached and brought to the surface. An oil lease must be construed, therefore, with a due regard to the known characteristics of the business. Oil and gas leases are ordinarily combined in the same instrument, and are classed together. for many purposes such classification is natural and appropriate, but this case brings us to consider an important difference between oil and gas, which makes it necessary to distinguish for some purposes between an oil and a gas lease. Oil, when brought to the surface, is gathered into receiving tank or tanks, at or near the well. When necessary or desirable, it is removed by gravity or by pumping into the pipe lines that serve the district in which the well is located, and conveyed to storage tanks, where it remains until delivered to a purchaser. It is a matter of no consequence what the pressure may be at the well, for there can be none in the tanks except that of gravity. The well which throws off violently its five thousand barrels per day and that which reluctantly gives up four or five barrels under the persuasive power of the pump will have their product gathered into the same lines of transportation, or resting in the same storage tanks. Gas cannot be gathered, stored, or transported in this manner. If found in sufficient quantity, it is turned from the well into the line, and the pressure at the mouth of the well is the motive power by which it is driven through the line to the consumer's line. If a pressure at a given well is much below that in the line with which it is connected, the gas from that well cannot enter the line, but will be driven back by the superior force it encounters at the point of connection. For this reason, a well producing gas in sufficient quantity to be profitably utilized if there was a market for it near at hand, may be entirely valueless if its product must find a market at a distance too great to justify its transportation by a line of its own. * * * * * * * In gas territory, the lessee may sink many wells and find gas in them all, but

Collins v. Mechling, 1 Pa. Sup. Ct. Rep. 594.
Blair v. Gas Co., 12 Ohio Cr. Rep. 78.
146 Pa. St. 185, 23 Atl. Rep. 164.

he can only utilize such of them as have a volume and pressure sufficient to enable him to transport the gas through his line and deliver it to the purchaser. * * * * * The mistake of the court below was in failing to take account of and to read into the contract between the parties, the peculiar nature and characteristics of the business of producing and transporting gas, which the parties themselves well understood, and which their contract shows was in their minds when it was entered into."

The question as to whether an abandonment of a lease has been made by the lessee thereof or not, is a mixed question of fact and intention and therefore for the jury.[17]

SUMNER KENNER.

Huntington, Indiana.

[17] Mitchell v. Carder, 21 W. Va. 277; 15 Am. & Eng. Enc. of Law, p. 546.

DUTY OF TELEPHONE COMPANY TO FURNISH SERVICE.

CUMBERLAND TELEGRAPH & TELEPHONE CO. v. HOBART.

Supreme Court of Mississippi, Dec. 10, 1906.

A telephone company having cut out a subscriber's phone wrongfully was held liable for the inconvenience, annoyance and actual damages arising out of the loss of service of same.

MAYES, J.: Mr. Hobart sued the Cumberland Telegraph & Telephone Company for the sum of $2,000 for damages for wrongfully cutting out his telephone. The facts in the case are as follows: Mr. Hobart resided about a mile and a half from Vicksburg on what is known as the "Warrenton Road." He had entered into a contract for a telephone to be put into his residence some years previous to the date at which this suit was brought, and subsequently, his wife having a store, he saw the manager of the telephone company, and asked him to place a telephone in this store, which the company did. At the time they went out to place the telephone in the storehouse of his wife, Mr. Hobart himself was not present, and the telephone company presenting a contract to be signed, the clerk in the store signed it in the name of Mrs. Hobart, so that the telephone company had a contract with Mr. Hobart for the telephone in his residence and a contract with Mrs. Hobart, signed for her, by the clerk, for the telephone in the store. It is stated in the testimony that the telephone company believed that the contract was signed by Mr. Hobart, he having spoken to them about it, and that the charge for the rent of the telephone in the store was placed on the books to Mr. Hobart, though the written contract was in the name of his wife, so far as the store was concerned. About a month, or such matter, after the telephone had been placed in the store, Mrs. Hobart sold the store, and Mr. Hobart states that, when the store was sold, he notified the telephone company to take out the telephone in the store. Some time in July, 1905, Mr. Hobart was away from home four or five days on his plantation in Louisiana, and returning about the 15 or 16th, he found his telephone cut out. He rang up the office, and asked them what was the matter, and they told him he was cut out, and the party that answered the telephone said "they knew all about him, and that his telephone would not be put back on the line." Mr. Hobart had not paid his rental for his telephone for the month of June and on the 15th or 16th of July he was cut out. It also seems that there was some $3.10 due on the contract of Mrs. Hobart for the telephone in the store. The next morning Mr. Hobart went into Vicksburg and into the manager's office of the telephone company, tendered his rental for the month of June and asked to be put back on the line. This the manager declined to do because they said he owed them $3.10 on the store telephone. Mr. Hobart told them that he did not owe for the telephone in the store, that it was his wife's contract, the store belonged to her, and if she owed anything to present her the bill. He tendered to them the $2 for the rental for the month of June due by himself on his residence telephone, and $2 in advance for the next month, and requested reinstatement of the service, but they declined to accept it because he would not pay the full amount as they claimed; that is to say, both under his wife's contract and his own, so that when they declined to reinstate his telephone they had full knowledge that the $3.10 was the debt of Mrs. Hobart. They sent out a lineman, and cut out the telephone, and removed it from Mr. Hobart's residence. Mr. Hobart says that when they came to remove the 'phone, he tendered them $6 paying in advance for the residence telephone, which they declined to accept. He was without a telephone for three or four months under these circumstances. Mr. Hobart claims to have been damaged in many ways by the removal of the telephone, but that it is difficult to enumerate the exact amount, and the ways in which he was damaged. That he lived out in the country, and that it was an almost indispensable adjunct to his household, and, yet difficult to enumerate in dollars and cents; that when he was in town and wanted anything he could telephone. When he wanted to send things home, he was in the habit of putting them on the car and telephoning some one at the house to meet the car and get the things; that after the telephone was cut out he could not do this, but had to send a boy; that he suffered inconvenience and annoyance in ways too numerous to name, and too difficult to put in

dollars and cents, and that the telephone was a necessity to him. He used the telephone on his place in Louisiana, and he used it as a matter of convenience to talk home. While he was without the telephone he was taken sick, and suffered great annoyance and inconvenience in not having a telephone in his house; that, to his recollection, he spent $25 to $30 for messengers to send things home; that when he had long distance calls several times, he would have to go out at night to his neighbor's house to talk, and when his family was sick, he was put to much inconvenience, and deprived of the protection which the telephone gave him at his house. The case was submitted to the jury on these facts, and they awarded damage in the sum of $150. The record clearly shows that there were two distinct contracts, one by Mr. Hobart for the telephone in his dwelling, and another contract in the name of Mrs. Hobart for the telephone in her store.

It is attempted to be shown that the telephone company thought they were making the contract at the store with Mr. Hobart, instead of Mrs. Hobart, but that can make no difference in the decision of this case for the reason that the contracts were separate contracts relating to different properties, and again they were informed that it was Mrs. Hobart's contract after they had cut out the residence, and again the personnel of the party contracted with could make no difference for the reason that they were bound to put in the telephone in the store at the request of either Mr. or Mrs. Hobart. These contracts were separate and independent contracts having no relation with each other, and because of the failure to pay charges on one of the telephones, the telephone company had no right to cut out the other. In the first place, they were contracts between different parties; in the next place, if this were not true, they were separate contracts about different properties and the telephone company could only cut out that telephone for which there had been a default in payment. At the time that Mr. Hobart's telephone was cut out, he was in default on his residence, and the telephone company had the right to cut him out after due notice to him, but when he tendered the money properly due on the telephone in his dwelling, they had no right to undertake to coerce payment of the amount due on the other telephone by refusing to reinstate the service in his house. In the first place, he did not owe it, it was his wife's debt. And in the next place, if he had owed it, it was a separate contract, and they could only put an end to the particular contract wherein there was default. In the case of Burke v. City of Water Valley (Miss.), 40 So. Rep. 821, Whitfield, C. J., says: "If gas is supplied to the owner of different houses under separate contracts, failure to pay the gas bill on one house does not authorize the cutting off of the gas from the other." Gaslight Co. v. Colliday, 25 Md. 1; Lloyd v. Washington Gaslight Co., 1 Mackey, D. C. 331. Gas companies and telephone companies, being public service corporations, are controlled by the same principles of law. It is shown by the testimony that the telephone company was fully notified that the amount of $3.10 was the amount due on Mrs. Hobart's telephone and for which she was liable, yet, notwithstanding this, they cut out the telephone in the dwelling anyway, which was unwarranted. A telephone company may cut out a subscriber for nonpayment of dues on reasonable notice, when the dues are not actually paid, but when they are paid, or when they are offered to be paid, they act at their risk in refusing reinstatement of service when requested so to do.

The only other question necessary for us to consider is the question of the amount of damage. The jury in this case allowed the sum of $150, and we cannot say that their judgment was wrong in this matter. The law of damages, and what is proper to be allowed, must largely depend upon the nature of the suit in which damage is sought to be recovered. It was impossible for Mr. Hobart to itemize each separate item of damage occasioned him by the removal of his telephone. The difficulty in doing this is manifest to everyone. The telephone has come to be a necessity. It is the thing which completes the use of a home. It is resorted to daily, and hourly, to such an extent as to be regarded as indispensable, yet, when it comes to taking pencil and paper and calculating day by day what pecuniary value it possesses, it is almost impossible. The inconvenience, the annoyance, and the trouble of being without one is a damage which no one can accurately estimate. It is such inconvenience and annoyance as is only to be fully appreciated when one is deprived of its use; its loss is a great and distinct damage, yet such damage as is not susceptible of exact measurement. When the telephone company undertook to cut out the residence telephone because of the nonpayment of rent, Mr. Hobart was in default and they had the right to do it. When they declined to reinstate it after having been offered the rental of the telephone in the dwelling house, it was their duty to reinstate it, and not having done so, they should compensate Mr. Hobart for his pecuniary loss, and such inconvenience and annoyance in being wrongfully deprived of its use, as the jury thought proper under the facts. We do not say that damage for inconvenience and annoyance may be recovered in all cases, but from the very nature of the subject matter of this litigation, annoyance and inconvenience is one of the main elements of damages. In the case of Hewlett v. George, 68 Miss. 703, 9 So. Rep. 885, 13 L. R. A. 682, this court held that "compensatory damages are not necessarily limited to actual money losses." Again, in the case of Railway Co. v. Bloom, 71 Miss. 247, 15 So. Rep. 72, the court held that damage for discomfort and inconvenience might properly be considered as compensatory damages.

In the case of Shepard v. Milwaukee Gaslight Co., 82 Am.Dec, 681, when the question as to damage was that of compensation merely, the court said: "But it is said that the court erred in the rule of damages. It told the jury that 'the plaintiff, if entitled to a verdict, should have such damages as will compensate him for the pecuniary loss, and also for the inconvenience and annoyance experienced by him in his mercantile business arising out of the defendant's refusal to furnish gas to the plaintiff.' It is claimed that this instruction gave the plaintiff punitive or vindictive damages. But we think this is clearly not so. The inconvenience and annoyance occasioned directly by the wrongful act or refusal of the defendant are always legitimate items in estimating the damages in actions of this kind. Vindictive damages are those which are given over and above all this as punishment for the other party. In actions for a nuisance, the damage usually consists almost entirely in inconvenience and annoyance. So, also, in many other actions of tort. In Ives v. Humphreys, 1 E. D. Smith (N. Y.), 201, the court says: 'Even if the plaintiff be confined strictly to compensation for the injury sustained by him, the jury are to determine the extent of the injury, and the equivalent damages, in view of all the circumstances of injury, insult, invasion of the privacy, and interference with the comfort of the plaintiff and his family.' And again: 'For an involuntary trespass, or a trespass committed under an honest mistake, the damages should be confined to compensation for the injury sustained by the plaintiff, and in estimating the amount of such damages, all of the particulars wherein the plaintiff is aggrieved, may be considered, whether pecuniary loss or pain or insult, or inconvenience.'" We quote this case with approval as applied to this class of cases. When the telephone company undertake to cut out their subscribers for debts which they claim to be due them, they may do so if the subscriber actually owes them, but if the subscriber is not indebted to them they are liable in damage to the subscriber for such actual damage, inconvenience, and annoyance as is occasioned him by wrongfully cutting out his telephone.

The damage sustained by the loss of a telephone in its very nature is largely composed of inconvenience and annoyance. That a person deprived of the use of a telephone is materially damaged, all will concede. What is the amount of damage in dollars and cents cannot be accurately stated by the party suing for the reason that his damage consists not only in pecuniary losses, but it consists in inconvenience, discomfort, and annoyance, and it must be left to the jury to determine what is the damage sustained, taking into consideration the discomfort, the annoyance and inconvenience suffered, together with actual pecuniary losses. Would it be contended if one's gas is wrongfully cut off that compensatory damage would be only what it would cost to buy tallow candles? To so hold, and to hold that annoyance, discomfort, and inconvenience was not a proper element of damage to be considered by a jury when the service of a telephone has been wrongfully discontinued, would be to place the public at the mercy of the telephone company, and force them to yield to many unjust demands rather than contest, for fear of a discontinuance of the service. Such coercive powers cannot be sanctioned.

We would unhesitatingly set aside a verdict of the jury where the amount allowed was grossly excessive or unreasonable, but we shall be slow to interfere with their judgment when it is not so. The telephone may be considered a necessary household utility, so much so that the thought of losing it will coerce almost any one into payment of any debt claimed within reason rather than have it cut out. It is a public service corporation without competition, monopolistic in nature, and the patrons have no choice but to accept its service, and they have not the privilege of selecting to do business with a competitor because there is no competitor, and for this reason the rights of the public should be carefully guarded against oppressive methods used for the purpose of collecting unjust demands. The necessities of the law must meet modern conditions.

The action of the telephone company was wrong, and it was not necessary for Mr. Hobart to pay the wrongfully demanded bill for the purpose of retaining the telephone in his dwelling. If he had done this, it would have been necessary for him to sue for the recovery of the amount overpaid, and to require him to do this, in the language of the case of Wood v. Auburn (Me.), 32 Atl. Rep. 908. 29 L. R. A. 377 "would be a violation of the fundamental juristic principle of procedure. That principle is that the claimant, not the defendant, shall resort to judicial process." This case is in perfect accord with the case of Cumberland Telephone Co. v. Baker (Miss.), 37 So. Rep. 1012. In that case the telephone company had rendered the service, and the rental was properly due from Mr. Baker, but he claimed an unliquidated amount as damage for poor service, and paid his bill less the amount so claimed by him, whereupon his telephone was discontinued, and the court held that he was not entitled to exemplary damages.

We can find no reversible error in this cause. Affirmed.

NOTE.—*Damages—When a Telephone Company Wrongfully Cuts Out a Subscriber's Telephone and Refuses to Reinstate it, it is not only Liable for Actual Damages but also for Inconvenience and Annoyance, Caused by Being Deprived of the Use of the Telephone.*—The principal case is one which presents a condition falling just short of an aggressive tort. The wrongful refusal to reinstate the telephone when the plain legal duty was violated, resulting in inconvenience and annoyance to the subscriber, presents a tort aspect, so that not only the loss resulting from the breach of the contract by which actual damage

was suffered, but damages for the inconvenience and annoyance also were recoverable. It appears that the defendant's servants evidently believed that they had a right to take out the telephone and refuse to put it back under a mistaken notion of the legal right of the company. This is a case where the law aids the remedy against the wrong doer and every reasonable intendment is taken against him and in favor of the party injured and the damages are regarded as compensatory.

The case of Heulett v. W. W. George, Exr., 68 Miss. 703, 9 So. Rep. 885, 13 L. R. A. 350, was a case where the plaintiff had wrongfully been confined in an asylum. It was held that shame, mortification and mental anguish were proper elements of compensatory damages. An article entitled *Contra Spoiliatorem Praesumuntur*, 61 Cent. L. J. 441, may be profitably read in this connection. Also Fusion of the Tort and Contract Conception, Vol. 1, Street's Foundation of Legal Liability, 422, where he says, "we cannot but believe that, as the courts exhaust themselves in the limitations and perplexities of the contract conception they will turn more and more to the tort theory; or rather, as they push the contract conception onward they will discover the broader truth, for it cannot be doubted that the tort conception of liability is in a sense the true goal of legal theory wherever the two aspects of liability are found to coexist." In this connection it is not out of place to note the tendency of later years to extend the domain of damages for mental suffering. Says Mr. Sutherland in his great work on Damages, Vol. 1, p. 275, 4th Ed.: "There has been a marked development of the law concerning liability for mental anguish or pain since the publication of the first edition of this work. It was then well settled that such pain, when it resulted from physical injury, was an element of damages. There was originally a little hesitancy on the part of some of the courts in reaching that conclusion, but there is now no dissent from it. The mental suffering which can thus be recovered for must proceed from and be caused by the act or neglect which produced the physical injury. The bodily hurt which gives a right of recovery for the resulting mental suffering may be very small; if it is a ground of action it is enough." On page 277 *Id.* the learned author proceeds as follows: "Such actions are distinguishable from another class in which mental distress is an element of damage, because the facts out of which they arise affect the social and business standing of the parties plaintiff, and in many ways tend to harrass and annoy and even degrade them in the eyes of the community. To some extent this is the effect of various indignities which are suffered; and because of it a passenger who is wrongfully ejected from a train may recover for the effect of the insult and indignity to his feelings though the case does not warrant the imposition of punitory damages. In Texas mental suffering is an element of damages where it results from a breach of a carrier's contract. The authorities generally do not go so far as to allow damages for the disappointment, annoyance and vexation which result from a breach of such a contract."

In the case of St. L., etc., R. v. Berry, 15 S. W. Rep. 48, the extra expense incurred by plaintiff on account of his delay and the failure to receive his baggage was $90. A verdict for $500 was sustained. This is in line with the principal case. It is useless to contend that the domain of damages is not extending more and more to cover mental distress and to rights of privacy which but a very few years back were not considered as proper elements of damage.

JETSAM AND FLOTSAM.

LIABILITY FOR INJURY TO LICENSEES.

Some weeks ago there was given in this place a note of the decision of the Supreme Court of Iowa in Croft v. Chicago, etc., Ry. Co., 108 N. W. Rep. 1053. This decision has received considerable notice in legal periodicals, and, so far as we have observed, has been approved. It was held that a railroad company was liable for injuries to the wife of a station agent who, to the knowledge of the officers of the railroad in charge of the division in question and without objection by them, was in the habit of assisting her husband in his work in the station office, where she was injured by the derailment of a train caused by running it at a dangerous speed over a defective track. It would seem that the determination of the court, that there was owing to the wife, under the circumstances, although only a licensee, the duty of avoiding acts of positive negligence, is supported by sound principle and sufficient authority.

In contrast with this decision is that of the Supreme Judicial Court of Massachusetts in Creeden v. Boston, etc., R. R. Co., 79 N. E. Rep. 344, in which a demurrer to the declaration was sustained. It was alleged that plaintiff's intestate, being an officer of the watch and constable, upon information and belief that criminals were escaping on a certain train of defendant, for the purpose of apprehending said criminals, boarded said train then standing at a station, and having apprehended a suspected person, alighted and walked away with him, and in the darkness fell over the side of an unsafe bridge that was not intended for the use of passengers, though it was contiguous to the station and upon the defendant's premises. The court holds that the intestate was a mere licensee and that the company was not liable to his estate for such passive negligence as there may have been. The following is the opinion: "It is to be noted that there is no allegation that the plaintiff's intestate entered the train for the purpose of serving a warrant for the arrest of any person whom he believed to be there, nor that he had any reasonable ground to believe that there was being committed upon the train any breach of the peace or other crime which required him to enter for the purpose of preserving public order, nor that there were upon the train persons who had committed a felony or any of the misdemeanors for which under the statutes it is lawful for a constable to arrest without a warrant. See Acts 1906, p. 388, ch. 403, amending Rev. Laws, ch. 11, sec. 223; ch. 46, secs. 7, 13; ch. 52, sec. 8; ch. 57, sec. 93; ch. 66, sec. 5; ch. 75, sec. 128; ch. 91, secs. 4, 123, 134; ch. 100, sec. 86; ch. 108, secs. 10, 17, 23; ch. 111, sec. 260; ch. 166, sec. 2; ch. 204, sec. 20; ch. 208, secs. 109, 121; ch. 212, secs. 36, 46, 47, 53, 58, 60, 62, 74, 80; ch. 214, secs. 2, 6. The vital allegations are that he went aboard for the purpose of 'apprehending criminals,' and 'examining certain persons abroad whom he had reason to suspect of an unlawful design.' 'Criminals' is a word of broad significance, and includes those who may have committed the most trifling infractions of a penal statute as well as those guilty of the most heinous offenses. It obviously describes a large number of persons whom a constable would have no right to arrest without a warrant. The other statement of purpose for which the entry upon the train was made was to perform the duty required under Rev. Laws (ch. 31, sec. 2), relating to watch and ward. The justification which this statute might afford reaches only to the watch in the examination of 'all persons abroad whom they have reason to suspect of

an unlawful design.' It has been strongly argued in behalf of the defendant that, in view of the history of this statute, it should be so construed to apply only to those persons who are walking abroad. See statute passed October 19, 1652, Records of Mass., Vol. 3, p. 282; Province Laws 1699–1700, p. 381, ch. 10; Acts 1796, p. 165, ch. 82; Rev. St. 1836, ch. 17, sec. 4; Province Laws 1712-13, p. 699, ch. 4; Report of Comm'rs of Revision, Gen. St., p. 204, ch. 23, sec. 4; Pratt v. St. Comm'rs, 139 Mass. 559, 563, 2 N. E. Rep. 675.

Without passing upon this question, it is enough for the purposes of the present case to determine that one who has become a passenger upon a steam railroad train and has placed himself in the carriage of the common carrier cannot be said to be abroad. Therefore, the constable was at most a mere licensee. The allegations of the declaration place him upon a quite different basis than was the plaintiff in Parker v. Barnard, 135 Mass. 116, 46 Am. Rep. 460, where the police officer in the execution of his duty was injured by reason of a violation of statute on the part of the owner of the building. This case is also distinguishable from Learoyd v. Godfrey, 138 Mass. 315, where the police officer had been expressly invited upon the premises, and in addition to the invitation went for the purpose of suppressing a breach of the peace. The particular circumstance in Gordon v. Cummings, 152 Mass. 513, 25 N. E. Rep. 978, 9 L. R. A. 640, 23 Am. St. Rep. 846, and Finnegan v. Fall River Gas Works, 159 Mass. 311, 34 N. E. Rep. 523, were such as to warrant the finding of an implied invitation on the part of the owner to enter the premises where the injuries were received. It is not alleged here that the defendant had failed to perform any statutory obligation incumbent upon it, which is a further fact distinguishing it from Parker v. Barnard, 135 Mass. 116, 46 Am. St. Rep. 460. There was not even the implied invitation on the part of the defendant for the constable to enter the train, which might possibly be held to exist if a theft or other crime was being committed upon the train. Nor are the plaintiffs' rights any stronger, if indeed they are as strong, as those of a fireman entering upon property for the purpose of protecting it from destruction. Yet it has been held in other jurisdictions that under such circumstances the person entering has only the rights of a licensee. See Gibson v. Leonard, 143 Ill. 182, 32 N. E. Rep. 182, 17 L. R. A. 588, 36 Am. St. Rep. 376; Beehler v. Daniels, 18 R. I. 563, 29 Atl. Rep. 6, 27 L. R. A. 512, 49 Am. St. Rep. 790; Kohn v. Lovett, 44 Ga. 251; Woods v. Miller, 30 App. Div. 232, 52 N. Y. Supp. 217; Woodruff v. Bowen, 136 Ind. 431, 34 N. E. Rep. 1113, 22 L. R. A. 198. The case made out by the declaration is somewhat like Berry v. Boston Elevated Ry., 188 Mass. 436, 74 N. E. Rep. 933, where the defendant was exonerated, the plaintiff having only the rights of a licensee. The defendant owed him no duty to keep its premises in a safe condition, and cannot be held liable ordinarily, unless there was some recklessness or wanton misconduct on the part of itself or servants. As was said by Mr. Justice Barker in Redigan v. Boston & Maine R. R., 155 Mass., at p. 47, 28 N. E. Rep. 1133, 14 L. R. A. 276, 31 Am. St. Rep. 520: 'The general rule is that a bare licensee has no cause of action on account of dangers existing in the place he is permitted to enter, but goes there at his own risk and must take the premises as he finds them. No duty is cast upon the owner to take care of the licensee or to see that he does not go to a dangerous place, but he must take his permission with its concomitant conditions and perils, and cannot recover for injuries caused by obstructions or pitfalls.' See Cowen v. Kirby, 180 Mass. 504, 62 N. E. Rep. 968; Byrnes v. Boston & Maine R. R., 181 Mass. 322, 63 N. E. Rep. 897; Griswold v. Boston & Maine R. R., 183 Mass. 434, 67 N. E. Rep. 354."

The decision will be seen to have turned on somewhat narrow grounds. It was found sufficient for the determination to hold that the intestate, though a peace officer, was not at the time acting strictly within his common law or his statutory powers as such, and, therefore, that he was a mere licensee and the company was not responsible for passive negligence. The court pertinently compares the rights of the intestate to those of a fireman entering upon property for the purpose of saving it from destruction, and shows that it has been held in other jurisdictions that a fireman's rights are only those of a licensee. The state of New York, as well as other states, has adopted statutory rules for the protection of firemen going into buildings and enacted that suits may lie for their benefit, or that of their representatives, if accident or injury result from neglect to comply with such precautions.

It would seem that the matter of protecting public officers in the discharge of their duty on private premises appropriately calls for legislative regulation so far as possible. The court intimates that there might be an implied invitation on the part of the defendant if a theft or other crime was being actually committed upon the train. In the absence of any request by the company or its officers, it is difficult to perceive any distinction between the case of a police officer entering a train on his own responsibility to arrest a person engaged in crime and a fireman entering a building to extinguish a fire.

Furthermore, this decision suggests an interesting question as to the scope of an invitation or consent to a police officer to enter private premises. In the present action the defective bridge was contiguous to the station and the case on the facts is therefore not unlike that of one who enters and is injured by a defect in a building. If, however, an officer, having entered a depot or train to make an arrest, pursues a criminal to a remote and unfrequented part of the company's premises in the night time, it would seem doubtful whether under any circumstances the defendant should be held practically as an insurer of the officer's safety.—*New York Law Journal.*

CORRESPONDENCE.

IS A COVENANT IN A DEED CREATING A MONOPOLY IN FAVOR OF ONE PARTICULAR OWNER VOID FOR THAT REASON?

Editor of the Central Law Journal:

I am a subscriber to your periodical and appreciate it very highly. I have noticed that you invite inquiries from subscribers and I therefore avail myself of the invitation.

A company lays out a town site and sells lots to whoever may buy, with a condition or covenant in the deed that the lot shall never be used for the purpose of manufacturing, selling or dealing in intoxicating liquors, and in the event that the purchaser or assignee should so use the property it will revert to the original grantor. A company, or at least some of the directors of the company, its chief controlling officer and others are interested in a saloon that is run and maintained in the town, where liquors are sold openly. Another party purchases a lot and opens a saloon. Action is brought under the covenant in the

deed. The question is raised, does not the covenant create a monopoly or is it not in restraint of trade when the fact appears that the principal officers of the company are interested in the traffic? It is so held in 75 Mich. 36, but the grounds upon which the decision rests are not given, nor are any principles enunciated in that case that would guide in another. I would be pleased to have some reader or the editor, give reasons and cite authorities upon which this case was decided. Yours very truly,

PARK HENSHAW.

Chico, Cal.

BOOK REVIEWS.

ENCYCLOPEDIA OF LAW AND PROCEDURE, VOL. 23.

We have already commented favorably on the prompt and efficient manner in which the serial volumes of the Cyc. are making their appearance, justifying, as it does, every promise of the publishers, and discounting the animadversions and dismal forebodings of its detractors. Volume 23 has just reached our desk for review and has afforded us much pleasure in its perusal, especially the articles of Hon. Henry Campbell Black on the subjects of "Intoxicating Liquors," and "Judgments," which are in reality a revision of this celebrated author's standard treatises on these important subjects of law. The article on Intoxicating Liquors covers 300 pages of condensed matter, citing all authorities exhaustively and providing material that would fill an ordinary 800 page law book. Of even greater value is Mr. Black's article on Judgments. This article covers over half the volume, a total of nearly 1,000 pages and contains matter enough to fill three ordinary volumes.

Other articles might be mentioned as being especially well treated, as for instance, "Interpleader," by Walter H. Michael and "Joint Stock Companies," by the same author; also the subject of "Joint Tenancy," by Henry H. Skyles.

Printed in one large volume of 1,622 pages and published by the American Law Book Company, New York.

HUMOR OF THE LAW.

In the progress of the trial of a certain case before the court and jury, a youngster of the street arab type was placed upon the stand as a witness on behalf of the plaintiff. Having testified rather pointedly, positively and effectively for plaintiff, in chief, he was turned over to defendant's counsel for cross-examination. Now, be it known, this gentleman was one of those who believe in "goin' after 'em"—especially women and small children. And this is how he did it.

"What do you do for a living?" he growled menacingly.

"Nawthin," drawled the unterrified youth.

"Where do you go to school?"

"Don't go," was the comprehensive response.

"You are just an idle, worthless loafer and vagabond, ain't you?"

"Reckon so," was the imperturbable admission.

"Where does your father live?" continued the burrowing and insatiate inquisitor.

"'Jest lives 'round, I guess."

"Guess? Don't you know?" thundered the insatiable searcher after facts, nodding, scowling confirmation of his worst fears at the chosen and empannelled twelve.

"You'll have to ask him, he can tell you better'n I can," replied the gamin, unabashed by the tone and melodramatic side play of counsel.

"He is just like yourself, an idle, worthless, good for nothing vagabond, ain't he?" pursued the discoverer, continuing to unpent his fury in thunder tones, and shaking a not-to-be-denied-the-truth index finger under the youth's nose. Then the lawyer "got his'n."

"Search me," answered the badgered one, with an appraisingly inquisitive survey of one of the panel, "you'd better ask him, he's on the jury."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Pendency of Other Action.—A petition in the orphans' court for a decree requiring an administrator to pay a distributive share under a decree of distribution held not barred by the pendency of a certain proceeding in the court of chancery.—*In re* Bayley's Estate, N. J , 68 Atl. Rep. 1117.

2. ABSENTEES—Alimony —Claim against estate of absentee for alimony held provable without personal notice to the absentee.—Purdon v. Blinn, Mass., 78 N. E. Rep. 462.

3. ADVERSE POSSESSION—Constructive Possession.—The doctrine of constructive possession to land held not to apply to specified cases —Lawrence v. Alabama State Land Co., Ala., 41 So. Rep. 612.

4. ADVERSE POSSESSION—Partition.—A commissioner's deed in partition held color of title to the whole of the land in controversy under which defendant acquired title by adverse possession.—Lang v. Osceola Consol. Min. Co., Mich., 108 N. W. Rep. 678.

5. ANIMALS—Half Interest in Colt.—An agreement that one should have a half interest in a colt on paying for the services of the stallion held valid and enforceable against a buyer of the mare with knowledge of the agreement.—Dorris v. Rice, Mich., 108 N. W. Rep. 700.

6. APPEAL AND ERROR—Bill of Exceptions.—Where a bill of exceptions was allowed and signed within the time prescribed by law, it would be presumed on appeal to have been submitted within the time prescribed by

county court rule 29, or that it was taken out of the rule as authorized by rule 46.—Boyce v. Bolster, Vt., 64 Atl. Rep. 79.

7. APPEAL AND ERROR—Discretion of Trial Court.—The allowance of questions somewhat leading in form is a matter within the discretion of the presiding judge, and it will not be controlled unless abused.—McBride v. Georgia Ry. & Electric Co., Ga., 54 S. E. Rep. 674.

8. APPEAL AND ERROR—Election Contest.—A judgment in a proceeding in the nature of a *quo warranto* to oust respondent from exercising and performing the functions, powers, and duties of coroner of the city of Denver held reviewable by writ of error, but not by appeal.—People v. Horan, Colo., 86 Pac. Rep. 252.

9. APPEAL AND ERROR—Harmless Error.—In an action for breach of contract defendant is not prejudiced by the admission of evidence as to a measure of damages not adopted by either the master or the court.—New York Bank Note Co. v. Kidder Press Mfg. Co., Mass., 78 N. E. Rep. 463.

10. APPEAL AND ERROR—Harmless Error.—A judgment for defendant on trial of a traverse of the affidavit in attachment will not be disturbed for alleged errors, where on the admitted facts the jury could not have rendered a different verdict.—Peace River Phosphate Min. Co. v. Singleton, Fla., 41 So. Rep. 594.

11. APPEAL AND ERROR—Suspensive Appeal.—A suspensive appeal will lie from an order refusing a preliminary injunction, but will not suspend or postpone the trial of the case on its merits.—Murphy v. Police Jury of St. Mary Parish, La., 41 So. Rep. 647.

12. APPEARANCE—Objections to Jurisdiction.—Where one appears and objects to the jurisdiction for defective service of summons, and his objections are overruled, and he files a cross-petition and asks for affirmative relief, he submits his person to the jurisdiction of the court for all purposes of the action.—Austin Mfg. Co. v. Hunter, Okla., 86 Pac. Rep. 298.

13. ARSON—Confessions.—A trial for arson without evidence other than the confession of accused held insufficient to show beyond a reasonable doubt that there was a willful and malicious burning of the house.—Williams v. State, Ga., 54 S. E. Rep. 661.

14. BAIL—Criminal Prosecution.—That the solicitor general, who prepared the indictment and presented it to the grand jury, and his successor were related to the accused, held no defense to a *scire facias* to forfeit a criminal bond, both being out of office and a new solicitor acting when the case was heard.—Salter v. State, Ga., 54 S. E. Rep. 685.

15. BANKRUPTCY—Bonds.—Where property had been seized under an execution prior to the filing of a bankruptcy petition against the owner, an injunction bond given by the petitioners in the bankruptcy proceedings to restrain a sale of the property pending adjudication was not a bond provided for the seizure of the property by Bankr. Act 1898, ch. 541, § 3e.—*In re* Hines, U. S. D. C., D. Oreg., 144 Fed. Rep. 147.

16. BANKRUPTCY—Election of Trustee.—The right to elect a trustee for a bankrupt being given to the creditors by Bankr. Act July 1, 1898, ch. 541, § 44, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438], their election should be permitted to stand, unless it clearly appears that in conducting it some principle of law, intended to secure the administration of the bankrupt's estate in the interest of his creditors, has been violated.—*In re* Eastlack, U. S. D. C., D. N. J., 145 Fed. Rep. 68.

17. BANKRUPTCY—Injunction to Prevent Disposing of Property.—A court of bankruptcy in a plenary suit by a trustee to recover money or property as a preference or a transfer in fraud of creditors, has jurisdiction to issue a preliminary injunction restraining defendant from disposing of the property.—Blake v. Nesbet, U. S. D. C., W. D. Mo., 144 Fed. Rep. 279.

18. BANKRUPTCY—Judgment Liens.—The lien of a judgment on exempt property, which under the law of the state remains in force notwithstanding the bankruptcy of the defendant, is not affected by the fact that the creditor proved his judgment in the bankruptcy proceedings, where he was allowed by the court to withdraw such proof without prejudice.—*In re* Weaver, U. S. D. C., N. D. Ga., 144 Fed. Rep. 229.

19. BANKRUPTCY—Liens Obtained Through Legal Proceedings.—Where property of an insolvent was sold by a sheriff under execution within four months prior to the debtor's bankruptcy, was delivered to the purchaser, and the proceeds collected and paid over to the judgment creditor prior to the filing of the petition in bankruptcy, Bankr. Act, ch. 541, § 67f, making void liens obtained through legal proceedings, has no application, and the only remedy open to the trustee to recover the property or its proceeds is a plenary suit against the creditor for receiving a voidable preference under section 60b (30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]).—*In re* Bailey, U. S. D. C., D. Oreg., 144 Fed. Rep. 214.

20. BANKRUPTCY—Property in Possession of Adverse Claimant.—A court of bankruptcy has jurisdiction to take possession by the marshal or a custodian of property claimed to belong to estate of an alleged bankrupt, but in the possession of an adverse claimant, where it is shown to be necessary to preserve it; such proceeding being one in bankruptcy and not a controversy at law or in equity within the meaning of Bankr. Act, ch. 541, § 23a.—*In re* Knopf, U. S. D. C., D. S. Car., 144 Fed. Rep. 245.

21. BANKRUPTCY — Property Vesting in Trustee.—A trustee in bankruptcy is entitled to possession of all the bankrupt's property, and to administer the same, although it may be subject to liens or in possession of a state court in proceedings to enforce a lien instituted within four months prior to the bankruptcy.—*In re* Kaplan, U. S. D. C., N. D. Ga., 144 Fed. Rep. 159.

22. BANKS AND BANKING—Effect of Notice.—Knowledge of attorney and president of corporation held not notice to bank making loan to corporation, though the persons named were also officers of the bank.—Wardlaw v. Troy Oil Mill, S. Car., 54 S. E. Rep. 658.

23. BANKS AND BANKING—Insolvency. — Depositor in insolvent bank held entitled to recover the full amount thereof in preference to the claims of the general creditors.—Orme v. Baker, Ohio, 78 N. E. Rep. 439.

24. BANKS AND BANKING—Limitations.—Directors of a national bank who had ceased to be such prior to the failure of the bank held entitled to plead limitations as a defense to a suit by a receiver to recover losses sustained by their alleged malfeasance and gross negligence.—Emerson v. Gaither, Md., 64 Atl. Rep. 26.

25. BENEFIT SOCIETIES—Expulsion of Member.—Where proceedings for the expulsion of a member of a mutual benefit society were taken without notice to her, she could not be required to appeal until notice of conviction and subsequent expulsion. — Kidder v. Supreme Commandery United Order of Golden Cross, Mass., 78 N. E. Rep. 469.

26. BILLS AND NOTES—Pleading.—Where a party withdrew his demurrer to the complaint as not stating facts constituting a cause of action, and by his answer raises the issue imperfectly pleaded, objection is waived.—Santa Rosa Bank v. Paxton, Cal., 86 Pac. Rep. 193.

27. CARRIERS—Duty to Accept Shipments.—A railroad cannot refuse to accept and transport coal tendered by a shipper on the ground that it is of inferior quality to other coal also produced on its line, and that the marketing of such coal will injuriously affect the sale and consequently the shipment of the superior quality.—Olanta Coal Min. Co. v. Beach Creek R. Co., U. S. C. C., W. D. Pa., 144 Fed. Rep. 150.

28. CARRIERS—Ejection of Passenger.—In an action against a railroad for the death of plaintiff's husband, caused by his ejection from a train while in a helpless condition, allegation in petition held a sufficient identification of the place of expulsion.—Macon, D. & S. R. Co. v. Moore, Ga., 54 S. E. Rep. 700.

29. CARRIERS—Injunction to Restrain Ticket Scalping.—In a suit for injunction to restrain the scalping of non-

transferable railroad tickets, it was error for the court to limit complainant's relief to special tickets issued or contemplated for particular gatherings.—Louisville & N. R. Co. v. Bitterman, U. S. C. C. of App., Fifth Circuit, 144 Fed. Rep. 84.

30. CARRIERS—Injuries to Passengers.—In an action against a carrier for injuries to a passenger held that the question as to whether plaintiff was injured as claimed was for a jury.—Hebblethwaite v. Old Colony St. Ry. Co., Mass., 78 N. E. Rep. 477.

31. CHATTEL MORTGAGES—Contract.—A chattel mortgage pledging personalty to the payment of a debt is an enforceable contract, though it describes such debt as a judgment which in fact has remained dormant for more than a year.—Brown v. Akeson, Kan., 86 Pac. Rep. 299.

32. CHATTEL MORTGAGES—Consideration.—Where a chattel mortgage is given to secure a dormant judgment, and in the mortgage the mortgagor agrees to pay any deficiency, in an action to recover such deficiency the judgment may be looked to to ascertain the amount of the debt.—Brown v. Akeson, Kan., 86 Pac. Rep. 299.

33. CHATTEL MORTGAGES—Notice of Mortgage.—Warehouse receipts for cotton, issued to a chattel mortgagor of the crop, and the registration of the mortgage, held to charge a purchaser of the cotton with notice that it was subject to the mortgage lien.—D. P. Haynes & Bro. v. W. C. Gray & Co., Ala., 41 So. Rep. 615.

34. CHATTEL MORTGAGES—Validity.—That a creditor did not extend credit on the faith of property covered by a prior chattel mortgage which was not recorded till after the credit was extended did not make the chattel mortgage a valid lien as against the creditor.—Wardlaw v. Troy Oil Mill, S. Car., 54 S. E. Rep. 658.

35. CONSPIRACY—Indictment.—Where defendants are charged with doing certain acts "before and on" a certain date, though evidence of acts done after that date is inadmissible as direct proof of an act then done in furtherance of the crime, it is competent as proof of acts done before or on said date.—Browne v. United States, U. S. C. C. of App., Second Circuit, 145 Fed. Rep. 1.

36. CONSTITUTIONAL LAW—Homestead.—Laws 1899, p. 119, ch. 4730, providing that a homestead shall descend to the widow of the owner thereof and shall not be subject to devise, is not a violation of the 14th amendment of the Constitution of the United States.—Saxon v. Rawls, Fla., 41 So. Rep. 594.

37. CONSTITUTIONAL LAW—Obligation of Contracts.—The constitutional limitations which prevent the legislature from impairing the obligation of contracts do not bar it from annulling obligations due to the public.—Cortelyou v. Anderson, N. J., 63 Atl. Rep. 1095.

38. CONSTITUTIONAL LAW—Persons Entitled to Raise Question.—A bounty inspector appointed pursuant to Act March 6, 1903 (Laws 1903, p. 168), relating to bounties on wild animals, held not entitled to raise the question of the invalidity of the act.—*In re* Terrett, Mont., 86 Pac. Rep. 266.

39. CONTRACTS—Arbitration Clause.—An arbitration clause on a building contract held not to apply to questions arising between the architect and contractor.—Payne v. Roberts, Pa., 64 Atl. Rep. 86.

40. CONTRACTS—Family Settlement.—A party to a contract made between him and his brothers to settle disputes in regard to their respective rights and interests in certain mining property held not entitled to avoid the same on the ground of duress.—Andrews v. Connolly, U. S. C. C., D. Colo., 145 Fed. Rep. 43.

41. CONTRACTS—Performance of Conditions.—Where a seller agreed to file a bond with a bank to perform the contract of sale without any time being fixed, it was bound to file such bond within a reasonable time.—Equitable Mfg. Co. v. Howard, Ala., 41 So. Rep. 628.

42. CONTRACTS—Restraint of Trade.—A contract by the seller of a printing press not to sell similar presses to be used for the same purpose, held not invalid as in restraint of trade.—New York Bank Note Co. v. Kidder Press Mfg. Co., Mass., 78 N. E. Rep. 463.

43. CORPORATIONS—Assignment of Property.—An assignment of choses of action by a corporation to its successor held not to convey rights growing out of fiduciary relations between the assignor and a party to a contract with it.—New York Bank Note Co. v. Kidder Press Mfg. Co., Mass., 78 N. E. Rep. 463.

44. CORPORATIONS—Creditors.—The holder of unpaid coupons of bonds secured by mortgage given by defendant held a creditor entitled to sue to have defendant declared insolvent and for the appointment of a receiver.—Reinhardt v. Interstate Telephone Co., N. J., 63 Atl. Rep. 1097.

45. CORPORATIONS—Distribution of Assets.—Creditor making application in proceeding to marshal assets to have his claims increased or amended after report made held required to show excusable neglect, inadvertence, or surprise.—Wardlaw v. Troy Oil Mill, S. Car., 54 S. E. Rep. 658.

46. CORPORATIONS—Equity Jurisdiction.—Equity has jurisdiction of a suit by the receiver of a corporation to compel its directors to account for losses incurred by their fraud, malfeasance, or gross negligence.—Emerson v. Gaither, Md., 64 Atl. Rep. 26.

47. CORPORATIONS—Injury to Corporation.—Neither a stockholder nor a person who has sold his stock can maintain an action against a third person for injuries sustained by fraud on the part of defendants in the carrying out of a contract between themselves and the corporation.—Ninneman v. Fox, Wash., 86 Pac. Rep. 213.

48. CRIMINAL EVIDENCE—Flight.—Where the state introduced evidence of flight, it was error to refuse to permit defendant, a negro, to show by a white man in the neighborhood that he immediately surrendered himself to witness by whom he was delivered to the sheriff.—Allen v. State, Ala., 41 So. Rep. 624.

49. CRIMINAL LAW—Conspiracy.—Where two persons have been found guilty of conspiracy, it is not improper to refuse a new trial to one of the defendants and grant it to the other.—Browne v. United States, U. S. C. C. of App., Second Circuit, 145 Fed. Rep. 1.

50. CRIMINAL LAW—Creation of Offense.—While congress may make the violation of a regulation of a head of a department made by its authority a penal offense, it must be done by specific act.—United States v. Sandefuhr, U. S. C. C., E. D. Ark., 145 Fed. Rep. 49.

51. CRIMINAL LAW—Proof of Motive.—The fact that evidence introduced to show motive in a criminal case also has a tendency to show the commission by defendant of other crimes does not render it inadmissible, if otherwise competent.—Thompson v. United States, U. S. C. C. of App., First Circuit, 144 Fed. Rep. 14.

52. CRIMINAL TRIAL—Acquittal.—In a prosecution for felony it is error to allow the verdict to be received by the clerk during a recess of the court in the absence of the prisoner though with the consent of his counsel.—Wells v. State, Ala., 41 So. Rep. 630.

53. CRIMINAL TRIAL—Bill of Exception.—A judge is without authority to sign bills of exception after the appeal has been lodged in the supreme court.—State v. Ruffin, La., 41 So. Rep. 647.

54. CRIMINAL TRIAL—Failure to Furnish Copy of Indictment.—The failure to furnish the accused or his counsel with a copy of the indictment and list of witnesses, in the absence of a demand therefor, does not constitute a valid ground for setting aside the verdict of guilty.—Fears v. State, Ga., 54 S. E. Rep. 667.

55. CRIMINAL TRIAL—Instructions.—In the absence of an appropriate written request, it was not incumbent on the court to amplify the instructions given as to self-defense; the evidence making out a case of murder.—Crawford v. State, Ga., 54 S. E. Rep. 695.

56. DAMAGES—Elements Constituting.—In an action for personal injuries, plaintiff is entitled to recover such amount as would reasonably compensate him for his injuries, including pain and suffering in the past and future as well as loss of time and wages and impairment

of earning ability.—Graboski v. New Castle Leather Co., Del., 64 Atl. Rep. 74.

57. DEATH—Action for Damages by Nonresident Alien. —In an action by nonresident alien parents to recover for the death of their minor son, there must be evidence to justify a reasonable expectation of pecuniary benefit to his parents in the continuance of his life.—Atchison, T. & S. F. Ry. Co. v. Fajardo, Kan., 86 Pac. Rep. 801.

58. DEATH—Rights of Aliens to Remedy.—The Ohio statutes, as construed by the supreme court of the state, gives a right of action for wrongful death, although the person killed and his next of kin were all aliens.—Baltimore & O. R. Co. v. Baldwin, U. S. C. C. of App., Sixth Circuit, 144 Fed. Rep. 53.

59. DEEDS—Construction.—Whether the language of a deed creates a reservation or exception from the grant depends on the intent of the parties.—Gill v. Fletcher, Ohio, 78 N. E. Rep. 433.

60. DEEDS—Conveyance by Husband to Wife.—In suit in equity by widow to recover land under writing given by her husband, evidence of antenuptial oral promise and payments thereunder held admissible.—Cowdry v. Cowdry, N. J., 64 Atl. Rep. 98

61. DEPOSITIONS—Motion to Quash.—A deposition held not subject to a motion to quash because no copy of certain papers referred to in one of the interrogatories had been served on the opposite party before the issuance of a commission and the taking of the deposition. —Equitable Mfg. Co. v. Howard, Ala., 41 So. Rep. 628.

62. ELECTRICITY—Contributory Negligence.—Whether a telephone lineman was guilty of contributory negligence proximately causing his injury by coming in contact with an electric light wire held for the jury.—Ziehn v. United Electric Light & Power Co., Md., 64 Atl. Rep. 61.

63. EQUITY—Family Settlement.—A court of equity in granting relief to a complainant may make it conditional on the doing of equity to defendant by paying a sum to which he is justly entitled, although he has filed no cross bill therefor.—Andrews v. Connolly, U. S. C. C., D. Colo., 145 Fed. Rep. 48.

64. EQUITY—Findings of Referee.—While the order referring a case to a master does not require him to report the evidence, objections as to the sufficiency of the proof to warrant certain findings are not tenable.—New York Bank Note Co. v. Kidder Press Mfg. Co., Mass., 78 N. E. Rep. 463.

65. EQUITY—Jurisdiction.—Jurisdiction of equity held not to extend to false representations as to validity of patent rights or title thereto, involving no breach of trust or contract.—Aberthaw Const. Co. v. Ransome, Mass., 78 N. E. Rep. 485.

66. EQUITY—Multifariousness.—A bill of a receiver of a national bank against directors, ex-directors, and the representative of deceased directors for malfeasance and gross negligence, held multifarious as to some of the defendants.—Emerson v. Gaither, Md., 64 Atl. Rep. 26.

67. ESCROWS—Delivery by Depository.—If a deed to real estate is signed and delivered to a depository as an escrow, or to a special agent, a delivery to the grantee without the happening of the condition named by the parties would not be lawful.—Anderson v. Goodwin, Ga., 54 S. E. Rep. 679.

68. ESTOPPEL — Evidence. — To establish estoppel against mortgagee, purchaser at execution sale must not only show statement of mortgagee that the mortgage has been released, but that he sustained loss by reliance thereon.—Schwab v. Edge, Pa., 64 Atl. Rep. 80.

69. EVIDENCE—Caveat to Will.—On the issue as to the capacity of a testator, testimony as to statements by the testator's wife as to what the testator had said was inadmissible as hearsay.—Kelly v. Kelly, Md., 63 Atl. Rep. 1082.

70. EVIDENCE—Documents.—The question presented to the court on plaintiff requesting the adverse party to produce document is as to plaintiff's ability through the intervention of the court to obtain possession thereof for evidential use.—Banks v. Connecticut Ry. & Lighting Co., Conn., 64 Atl. Rep. 14.

71. EVIDENCE—Opinions.—Where the issue is whether or not a devastavit has been committed by an administrator, the opinion of witnesses that the estate represented by him was insolvent at the time of the death of his intestate is of no probative value.—Worthy v. Battle, Ga., 54 S. E. Rep. 667.

72. EVIDENCE — Uncommunicated Reasons or Intentions.—A defendant claiming title by adverse possession cannot when sued in ejectment by a party showing a complete chain of title testify why he did not pay taxes on the premises.—Lawrence v. Alabama State Land Co., Ala., 41 So. Rep. 612.

73. EXECUTION—Claims of Third Persons.—Whether a claimant asserting ownership to property levied on "took his chances" was inadmissible in evidence in the trial of the claim case.—Hirsh & Co. v. Beverly, Ga., 54 S. E. Rep. 678.

74. EXECUTION—Third Opposition.—Where wife files a third opposition, seizing creditor held to have a legal interest in defending the legality of his own proceedings and resisting the claims of the wife by means of any legal defense.—Pelletier v. State Nat. Bank, La., 41 So. Rep. 640.

75. EXECUTORS AND ADMINISTRATORS — Claims not Presented Within Time.—Complainant in a suit against executors on a claim against the estate not brought until after two years from the qualification of the executors held entitled to relief under Rev. Laws, ch. 141, §§ 9, 10.—McMahon v. Miller, Mass., 78 N. E. Rep. 457.

76. EXECUTORS AND ADMINISTRATORS—Setting Aside Sale.—An heir at law who aids in private sale of certain property of a decedant held in no position to invoke equitable relief to set aside a sale so made on the ground that it is a private sale and not a public administrator's sale.—Anderson v. Goodwin, Ga., 54 S. E. Rep. 679.

77. FALSE IMPRISONMENT—Question for Jury.—Where plaintiff in action for false imprisonment has submitted to the defendant, it is a question for the jury whether the submission was voluntary or brought about by fear of force.—Hebrew v. Pulis, N. J., 64 Atl. Rep. 121.

78. FIRE INSURANCE — Arbitration of Loss. — Under a fire policy, the failure of appraisers to render a legal award without the fault of the insured held not to affect his right to maintain an action on the policy. — Home Ins. Co. of New York v. M. Schiff's Sons, Md., 64 Atl. Rep 63.

79. FISH—Ponds and Lakes in New Hampshire.—Laws N. H. 1887, p. 446, ch. 86, which provides that no action shall be maintained against any person for crossing uncultivated land to reach any public water for the purpose of taking fish, and declaring all natural ponds and lakes containing more than 20 acres public waters, was a proper recognition of the common-law rule in the state by virtue of which such ponds were public waters, and declaratory of the public right of fishing therein, and was within the power of the legislature and valid.—Percy Summer Club v. Astle, U. S. C. C., D. N. H., 145 Fed. Rep. 53.

80. FRAUDS, STATUTE OF—Husband and Wife.—Where a husband's contract to convey real estate to his wife in consideration of purchase money advanced was unenforceable for uncertainty and for violation of the statute of frauds, equity had jurisdiction to decree compensation against the husband's estate and heirs to the extent of the purchase money paid and the value of lasting improvements.—Cross v. Iler, Md., 64 Atl. Rep. 33.

81. GUARDIAN AND WARD—Provisional Accounting.—A minor on reaching majority is not entitled to appeal from the homologation of a provisional tableau.—Succession of Guillebert, La., 41 So. Rep. 654.

82. HABEAS CORPUS—Adequacy of Other Remedies.—A person adjudged guilty of contempt may have the judgment reviewed by writ of error, and an original proceeding by *habeas corpus* for his discharge from the imprisonment imposed will not be entertained.—*Ex parte* Stidger, Colo., 86 Pac. Rep. 219.

83. HABEAS CORPUS — Grounds. — That the books or records of the warden of a state's prison did not show, and that the warden could not state, when any one of the petitioner's sentences had expired, held insufficient ground for the issuance of a writ of *habeas corpus*. — Woodward v. Bridges, U. S. D. C., D. Mass., 144 Fed. Rep. 156.

84. HEALTH—Powers of Board.—The board of health of a city held to have no authority to use a dwelling as a smallpox hospital without the owner's consent, except under a warrant issued in accordance with Pub. St. 1882, ch. 80, § 43.—Sallinger v. Smith, Mass., 78 N. E. Rep. 479.

85. HOMICIDE — Duel. — If two persons deliberately agree to fight with deadly weapons at a designated time and place, and, both being armed, meet by chance without any fresh cause or quarrel, and one shoots the other without justification, the crime is murder. — Bundrick v. State, Ga., 54 S. E. Rep. 683.

86. HOMICIDE—Evidence.—On a trial for homicide it is competent to prove by witnesses who examined the body of decedent as to where and when they first saw the body, that it had wounds on it, together with the appearance and location of the wounds.—Hill v. State, Ala., 41 So. Rep. 621.

87. INDICTMENT AND INFORMATION — Motion to Quash. —A court cannot set aside an indictment for lack of evidence to support it, even in those jurisdictions where such a motion may be entertained, where there was any evidence before the grand jury on which to base it.—United States v. Thomas, U. S. D. C., W. D. Mo., 145 Fed. Rep. 74.

88. INFANTS—Guardian Ad Litem. — Though the answer of the guardian *ad litem* admits the allegations of the bill of complaint to be true, the proper practice is to refer the cause to a master to take the proof and report thereon.—Mote v. Morton, Fla., 41 So. Rep. 607.

89. INJUNCTION—Contempt Proceedings.—A defendant who has disobeyed a temporary injunction, when cited for contempt, cannot justify his disobedience on the ground that the injunction was improvidently or erroneously granted.—Blake v. Nesbet, U. S. D. C., W. D. Mo., 144 Fed. Rep. 279.

90. INTOXICATING LIQUOR—Exemptions from Prohibition.—A person claiming exemption from the general prohibitions of the law as to the sale of intoxicating liquors by reason of a special privilege must establish every fact on which the privilege rests.—State v. Terry, N. J., 64 Atl. Rep. 113.

91. JOINT STOCK COMPANIES — Accounting. — Stockholder in a joint-stock company having transferable shares held entitled to maintain a bill to compel an accounting.—Taber v. Breck, Mass., 78 N. E. Rep. 472.

92. JOINT STOCK COMPANIES—Right to Profits.—Under a contract for the sale of shares in joint stock company, the seller held not entitled after the sale to maintain a bill for an accounting and distribution of profits earned during the time he held the shares.—Taber v. Breck, Mass., 78 N. E. Rep. 472.

93. JUDGMENT — Amendment. — An amendment of a judgment in attachment with regard to a party not before the court, and by striking out of the judgment the names of the parties defendant, was erroneous.—Latimer v. Sweat, Ga., 54 S. E. Rep. 673.

94. JUDGMENT—Collateral Attack.—In a collateral attack on a judgment, the judgment cannot be set aside for fraud in the procuring of a jury; the alleged fraud not appearing on the face of the judgment roll.—*In re* Davis' Estate, Cal., 86 Pac. Rep. 183.

95. JUDGMENT—Matters Concluded.—Where two vessels are both held in fault for a collision between one and a third vessel, and each is adjudged to pay half the damages, the decree is conclusive as between them, and neither can maintain a second suit against the other to recover the amount so paid. — Rhodes v. Interlake Transp. Co., U. S. D. C., N. D. Ohio, 144 Fed. Rep. 205.

96. JURY—Right to Trial by Jury.—The right to trial by jury does not extend to charges for contempt consisting of the violation of an injunction.—People v. Tool, Colo., 86 Pac. Rep. 224.

97. JUSTICES OF THE PEACE—Summons.—A summons in a suit on an open account before a justice may be amended by attaching thereto a bill of particulars, and where counsel for defendant has been handed a copy of the amendment before trial, the service was sufficiently formal.—Carter v. Pitts, Ga., 54 S. E. Rep. 695.

98. LARCENY—Indictment.—Where an indictment contains two counts charging burglary and larceny from the house, a verdict of guilty of larceny is not unwarranted on the ground that the evidence also shows defendant guilty of burglary.—Cannon v. State, Ga., 54 S. E. Rep. 692.

99. LEASES—Subsequent Agreements.—The parties to a lease may by a subsequent agreement prolong the term, although the lease is silent on this subject.—De Friest v. Bradley, Mass., 78 N. E. Rep. 467.

100. MANDAMUS — Matters of Discretion. — Mandamus will lie to compel the insurance commissioner to do an act in respect to which he has no discretion, but will not lie to compel the performance of a duty requiring the exercise of his judgment.—State v. Upson, Conn., 64 Atl. Rep. 2.

101. MANDAMUS — Probate Judge. — Where a claim against a county has been audited and allowed, the probate judge's duty to issue a warrant therefor under Code 1896, § 1416, is ministerial, the performance of which may be enforced by mandamus.—Smith v. McCutchen, Ala., 41 So. Rep. 619.

102. MARSHALING ASSETS AND SECURITIES — Chattel Mortgage.—Chattel mortgagee failing to record mortgage held not entitled to require subsequent creditor to resort first to sureties on its note.—Wardlaw v. Troy Oil Mill, S. Car., 54 S. E. Rep. 658.

103. MASTER AND SERVANT—Assumption of Risk.—An employee injured while assisting in feeding sheets into a mangle in a laundry held to have assumed the risk.—Kranich v. Knapp, Wash., 86 Pac. Rep. 207.

104. MASTER AND SERVANT—Contributory Negligence. —A servant of a railroad company held guilty of contributory negligence as a matter of law in dumping a slate car contrary to orders while it was moving at some speed before it reached the dumping ground.—Redus v. Milner Coal & R. Co., Ala., 41 So. Rep. 604.

105. MASTER AND SERVANT—Dangerous Premises.—Failure of a servant to notice a trap door in the floor of the hall of defendant's building through which such servant fell and was injured held not to establish his contributory negligence as a matter of law. — Falardeau v. Hoar, Mass., 78 N. E. Rep. 456.

106. MASTER AND SERVANT—Fellow Servants. — A servant excavating a trench and the foreman directing the work are fellow servants in a common employment.—Rocco v. F. A. Gillespie Co., N. J., 64 Atl. Rep. 117.

107. MASTER AND SERVANT—Injuries to Trackmen.—Trackmen employed by a railroad and engaged in repairing the track are not within the protection of a city ordinance limiting the speed of trains within the corporate limits of the city.—Norfolk & W. Ry. Co. v. Gesswine, U. S. C. C. of App., Sixth Circuit, 144 Fed. Rep. 56.

108. MASTER AND SERVANT—Obvious Risk.—In an action for injuries to plaintiff, employed in stringing wires for a telephone company, held a question for the jury whether the risk from a current of electricity from electric light wires of another company was an obvious one. —Snyer v. New York & N. J. Telephone Co., N. J., 64 Atl. Rep. 122.

109. MASTER AND SERVANT—Safe Place to Work.—Where a servant is ignorant of the dangerous character of a machine, tools, or place of work, it is the duty of the master to warn him.—Graboski v. New Castle Leather Co., Del., 64 Atl. Rep. 74.

110. MECHANICS' LIENS—Abandonment of Contract.—Answer of the jury to an issue in a suit to enforce a mechanic's lien held inconsistent with the idea that the

contractor abandoned his contract, so as to deprive him of a right to enforce a lien.—Rochford v. Rochford, Mass., 78 N. E. Rep. 454.

111. MECHANICS' LIENS—Material Furnished.—Manufacturer selling brick for erection of building held to have no mechanic's lien for brick which is resold, but to have right to apply payments on unsecured part of debt. —Wardlaw v. Troy Oil Mill, S. Car., 54 S. E. Rep. 658.

112. MECHANICS' LIEN—Material Men.—Failure of materialmen to distribute the materials sold among three separate buildings, in which they were used, held not to invalidate their lien, but at most to only postpone the same to other lien creditors under Code 1904, art. 63, § 31. —Fulton v. Parlett & Parlett, Md., 64 Atl. Rep. 58.

113. MORTGAGES—Application of Payments.—Election by mortgagee as to application of payments held not too late, if made by proper demand prior to the trial of the action to foreclose.—Advance Thresher Co. v. Hogan, Ohio, 78 N. E. Rep. 436.

114. MUNICIPAL CORPORATIONS—Assessments for Improvements.—The right to levy and collect betterment assessments is statutory, and the legislature may repeal the law authorizing such assessments, except so far as contractual obligations are involved.—Stone v. Street Com'rs of Boston, Mass., 78 N. E. Rep. 478.

115. MUNICIPAL CORPORATIONS—Civil Service.—A veteran employed in the labor service of a city under the civil service statutes and rules of the civil service commission held entitled to sue the city, on his wrongful discharge, for wages for work after his discharge.—Ransom v. City of Boston, Mass., 78 N. E. Rep. 481.

116. MUNICIPAL CORPORATIONS—Granting Exclusive Franchises.—A city of the second class in Kansas has no power under the constitution and statutes of the state to grant an exclusive franchise to a water, gas, or electric company to use its streets for a term of years, and a contract by which it attempts to do so is *ultra vires* and void as to its exclusive feature.—Water, Light & Gas Co. v. City of Hutchinson, U. S. C. C., D. Kan., 144 Fed. Rep. 256.

117. MUNICIPAL CORPORATIONS—Re-election of Ousted Officer.—The electors of a city, the mayor of which has been ousted for official misconduct, cannot in a special election limit the effect of the judgment of ouster by electing the unfaithful officer for the remainder of the forfeited term.—State v. Rose, Kan., 86 Pac. Rep. 296.

118. MUNICIPAL CORPORATIONS—Validity of Bond.—A village held estopped by recitals in bonds issued under authority given by Rev. St. Ohio 1892, § 2701, to extend a prior indebtedness to contest the validity of such bonds as against a *bona fide* holder on the ground of any irregularity in the creation of the original indebtedness.—Village of Bradford v. Cameron, U. S. C. C. of App., Sixth Circuit, 145 Fed. Rep. 21.

119. NAVIGABLE WATERS—Ownership of Lands Under Water.—Lands under the navigable waters of the bay of San Francisco below the line of low tide in front of the Oakland water front belong to the state, over which the owners of the shore lands have right of access to the navigable waters of the bay, subject to the policy of the state as expressed in Const. 1879, art. 15, § 2.—Southern Pac. Co. v. Western Pac. Ry. Co., U. S. C. C., N. D. Cal., 144 Fed. Rep. 160.

120. NEW TRIAL—Motion to Set Aside Verdict.—A party has no legal right to bring before the trial judge for examination persons who have given affidavits in opposition to his motion to set aside a verdict.—Goodwin v. Blanchard, N. H., 64 Atl. Rep. 22.

121. NUISANCE—Electric Light Plant.—Electric light plant held liable to an adjoining owner for injury to its building by operation of plant.—Ganster v. Metropolitan Electric Co., Pa., 64 Atl. Rep. 91.

122. PARDON—Breach of Conditions.—When a prisoner who has been at large on a conditional pardon is recommitted to serve the remainder of his term, the time he has served when at large is not to be treated as time served on his sentence.—*Ex parte* McKenna, Vt., 64 Atl. Rep. 77.

123. PARTITION—Decedent's Estate.—There is no statutory authority pending which a petition for partition of a decedent's real estate cannot be filed in the orphans' court.—*In re* Reifsnyder's Estate, Pa., 63 Atl. Rep. 1075.

124. PARTNERSHIP—Real Property.—Where partners own real estate as tenants in common, and one of them dies, the others as surviving partners cannot convey a good title to his interest.—Anderson v. Goodwin, Ga., 54 S. E. Rep. 679.

125. PATENTS—Infringement.—In action against assignee of patent for infringement, assignor held entitled to show prior state of art as bearing on construction and scope of patent.—Aberthaw Construction Co. v. Ransome, Mass., 78 N. E. Rep. 485.

126. PLEADING—Injunction.—Even where all the equities of the bill are denied by the answer, it is not a matter of course to dissolve the injunction; both the granting and continuing of injunctions resting largely in the sound judicial discretion of the court.—Godwin v. Phifer, Fla., 41 So. Rep. 597.

127. PLEADING—Replication.—When a replication ignores certain facts in a plea, and the defendant files a general rejoinder to the replication, the facts so ignored cease to be issues of the case.—New York Life Ins. Co. v. Mills, Fla., 41 So. Rep. 603.

128. PRINCIPAL AND AGENT—Authority of Agent.—Evidence of an attorney that he and another had the right to sell certain mules and pay the money to certain creditors was not objectionable on the ground that such authority should be in writing.—Hirsch & Co. v. Beverly, Ga., 54 S. E. Rep. 678.

129. PRINCIPAL AND AGENT—Ratification of Acts of Agent.—Act of a principal in bringing suit on a guaranty without knowledge that it had been altered by its agent without authority into a sealed instrument, did not constitute a ratification of the alteration.—Tulane University of Louisiana v. O'Connor, Mass., 78 N. E. Rep. 494.

130. PRINCIPAL AND SURETY—Application of Payments. —Where a creditor has received a mortgage covering the entire debt and a personal guaranty on a part of it, surety held not entitled to have the proceeds of foreclosure applied to the part of the debt guarantied.—Advance Thresher Co. v. Hogan, Ohio, 78 N. E. Rep. 436.

131. PUBLIC LANDS—Application to Purchase.—After a contest between applicants for the purchase of lands has been referred to the court, the surveyor general has no power to receive the application of a third person to purchase the land involved in the contest.—Darlington v. Butler, Cal., 86 Pac. Rep. 194.

132. RECEIVERS—Authority.—Where a receiver appointed to sell certain property was not directed to take possession thereof or to collect the rents, a refusal of one in possession to pay the rents to the receiver or surrender possession did not constitute contempt.—Wardlaw v. Herrington, Ga., 54 S. E. Rep. 699.

133. REMOVAL OF CAUSES—Time for Filing Petition.—The right of removal arises at any time during the progress of a case whenever by a change in the pleadings or proceedings the cause is rendered for the first time removable.—Barber v. Boston & M. R. Co., U. S. C. C., D. Vt., 145 Fed. Rep. 52.

134. SALES—Failure to Perform.—The failure of a purchaser of timber to pay the balance of the purchase money therefor at the time stipulated in the contract does not of itself furnish sufficient ground for a cancellation of the contract.—Godwin v. Phifer, Fla., 41 So. Rep. 597.

135. SALES—Joint Ownership.—Where three persons enter into a written contract of purchase, each signing his individual name, with a third party, in the absence of an allegation or proof to the contrary, they will be deemed joint owners.—Austin Mfg. Co. v. Hunter, Okla., 86 Pac. Rep. 293.

136. SCHOOLS AND SCHOOL DISTRICTS—Liability for Taxes.—That a taxpayer was not a resident of an independent school district at the time a schoolhouse tax

was voted by the electors did not exempt his property within the district from liability for such tax —Grout v. Illingworth, Iowa, 108 N. W. Rep. 528.

137. STATES—Constitutional Provision.—Under constitutional provision, when a county is entitled to two or more senators, the legislature must make an apportionment within the county according to population on the basis of the last state enumeration.—Williams v. Secretary of State. Mich., 108 N. W. Rep. 749.

138. STATES—Sovereign Powers.—All sovereign powers not limited by the federal constitution are vested in the states, except so far as the people of the respective states may have abridged such powers by their respective constitutions —People v. Tool, Colo., 86 Pac. Rep. 224.

139. STATUTES—Construction.—Where a statute is an amendment of and in addition to a prior statute, both statutes must be considered together.—Woodall v. Boston Elevated Ry. Co., Mass., 78 N. E. Rep. 446.

140. STREET RAILROADS—Contributory Negligence.—In an action for death of plaintiff's intestate in a collision with a street car, intestate's contributory negligence held to bar recovery.—Davis v. People's Ry. Co., Del., 64 Atl. Rep. 70.

141. STREET RAILROADS—Defective Transfer Ticket.—A passenger on a street car without a proper transfer ticket, due to the negligence of a conductor, held entitled to sue only for breach of contract for failure to furnish a proper transfer ticket.—Norton v. Consolidated Ry. Co., Conn., 63 Atl. Rep. 1087.

142. STREET RAILROADS—Duties of Elevated Road.—An elevated railroad held required to avail itself of appliances which in the reasonable operation of the road could be used to prevent sparks from falling to the street and injuring pedestrians there.—Woodall v. Boston Elevated Ry. Co., Mass., 78 N. E. Rep. 446.

143. STREET RAILROADS—Duties of Pedestrians Under Elevated Road —A pedestrian held not bound to wait until there is no train passing on the overhead railroad track.—Woodall v. Boston Elevated Ry. Co., Mass., 78 N. E. Rep. 446.

144. STREET RAILROADS—Failure to Look and Listen.—If a person goes on a street railroad track in close proximity to an approaching car without stopping, looking and listening, and is run over, it must be presumed that his conduct contributed to his death —Birmingham Ry. Light & Power Co. v. Ryan, Ala., 41 So. Rep. 616.

145. STREET RAILROADS—Willful and Wanton Conduct.—In an action against a street railroad company for personal injuries, certain requested charges ignoring the question of willful and wanton misconduct on the part of the motorman held properly refused.—Birmingham Ry. Light & Power Co. v. Ryan, Ala., 41 So. Rep. 616.

146. TAXATION—Exemption.—Where land is taken, or purchased when it could have been taken, and held for public use, it is exempt from taxation in the absence of any express statutory provision to the contrary.—Milford Water Co. v. Town of Hopkinton, Mass., 78 N. E. Rep. 451.

147. TAXATION—Lands Held for Public Use.—In order to exempt land of a corporation organized to administer a public trust, such as supplying water to a city, from taxation, it is immaterial whether the land was taken under statutory proceedings or obtained by deed from the landowner —Milford Water Co. v. Town of Hopkinton, Mass., 78 N. E. Rep. 451.

148. TAXATION—Tax Deed.—In support of a tax held it would be presumed payments of taxes by the purchaser subsequent to the sale were made at times making the recited consideration correct.—John v. Young, Kan., 86 Pac. Rep. 295.

149. TAXATION—Tax Sale.—Though property may have been assessed in the name of one not the owner, a sale for taxes, predicated on such assessment, falls within Const., art. 238, as a basis of prescription.—Crillen v. New Orleans Terminal Co., La., 41 So. Rep. 645.

150. TAX SALES—Laches.—An owner of lands who failed for 18 years to take any steps to redeem from or set aside a sale thereof for taxes, held barred by laches from maintaining a suit in equity to recover the same from an innocent purchaser after they had become valuable.—Arbuckle v. Kelley, U. S. C. C., E. D. Ark., 144 Fed. Rep. 276.

151. TRADE MARKS AND TRADE-NAMES—Copyright.—That plaintiff had copyrighted a name for a pavement manufactured by it held no ground for restraining defendant from contracting to put down a pavement designated as such pavement in the proposals, where the work was required to be done according to specifications.—Warren Bros. Co. v. Barber Asphalt Pav. Co., Mich., 108 N. W. Rep. 652.

152. TRIAL—Direction of Verdict.—A verdict can be directed only where the facts are undisputed, or where but one reasonable inference can be drawn therefrom.—Ziehn v. United Electric Light & Power Co., Md., 64 Atl. Rep. 61.

153. TRIAL—Pleading.—Plaintiff must recover on the cause of action laid in the declaration, and a verdict for defendant is required when the cause of action laid is not proved, though another cause of action may appear.—Burdette v. Crawford, Ga., 54 S. E. Rep. 677.

154. TRUSTS—Administration.—Trustee held not required to treat proceeds of sale of unproductive property as part of the income because of delay in producing income.—Jordan v. Jordan, Mass., 78 N. E. Rep. 459.

155. TRUSTS—Bill of Enforcement.—A bill filed by executors to obtain a decree for the performance of a testamentary trust, with directions, held to seek a determination whether they are trustees, which involves the question of the title to land, which could not be settled in this case.—Goetz v. Sickel, N. J., 63 Atl. Rep. 1116.

156. WATERS AND WATER COURSES—Abatement of Dam.—A landowner held estopped by his acquiescence in the building of a dam by which his land was flooded and injured, to maintain a suit to enjoin its maintenance.—Andrus v. Berkshire Power Co., U. S. C. C., D. Conn., 145 Fed. Rep. 47.

157. WILLS—Contest.—On a caveat to a will, where one of the heirs testified that she had returned the money stated in the will to have been advanced to her, testimony tending to contradict the statement was admissible.—Kelly v. Kelly, Md., 63 Atl. Rep. 1082.

158. WILLS—Disposition of Property.—Provision of a will standing alone held to furnish no ground *per se* for setting aside the instrument, no matter how unjust or apparently without known cause they are.—Horner v. Buckingham, Md., 64 Atl. Rep. 41.

159. WILLS—Probate.—In a collateral attack on a judgment admitting a will to probate it will be presumed that orders continuing the hearing, authorized by Code Civ. Proc., § 1306, had been regularly made.—*In re* Davis' Estate, Cal., 86 Pac. Rep. 183.

160. WITNESSES—Homicide.—To permit a witness for defendant on trial for homicide to answer a question on cross-examination as to how far he lived from the home of the father of the decedent was within the discretion of the trial court.—Hill v. State, Ala., 41 So. Rep. 621.

161. WITNESSES—Impeachment.—A statement made by the district attorney to the court in asking leniency in the sentence of a person previously convicted, and who was to be a witness for the government in a subsequent case, is not competent evidence in such case to impeach the credibility of the witness.—Thompson v. United States, U. S. C. C. of App., First Circuit, 144 Fed. Rep. 14.

162. WITNESSES—Leading Questions.—The allowance of questions somewhat leading in form is a matter within the discretion of the presiding judge, and it will not be controlled unless abused.—McBride v. Georgia Ry. & Electric Co., Ga., 54 S. E. Rep. 674.

163. WITNESSES—Wills.—Where contestant's husband was testatrix's sole heir, and contestant was the sole heir of her husband, she was a "party interested" and entitled to contest the probate of testatrix's will.—Rainey v. Ridgway, Ala., 41 So. Rep. 632.